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L E C T U R E S

O N

D A M A G E S .

B Y

P R O F. F L O Y D R. M E C H E M, A. M.

Notes taken by a student.

U N I V E R S I T Y O F M I C H I G A N .

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D A M A G E S .

L E C T U R E I.

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The subject of damages is one hampered by very few technical rules. Almost all the rules governing the subject have been worked out by the judges. There are very few rules indeed that are purely technical and arbitrary. A reason can be given more or less satisfactory for every rule given out.

Until comparatively late years but little has been written on the subject of damages. Sedgewick and Southerland are the principal books used by the practitioners in this country. Among English books the book of Mr. Mayne is the chief work. There is an American edition of this work - Wood's Mayne on Damages. Another work is Hale on Damages.

I. Definitions and Distinctions. The object of law is the creation and preservation of legal rights. Wherever the law creates or confers a right it also provides some means by which the right can be protected and enforced. There is some difference of opinion as to the origin of law and the nature of rights, but so much must be true, that wherever the law recognizes a right it also provides some means by which that right can be protected. We sometimes say that wherever there is a right there is a remedy; this is not altogether true. strictly there is a remedy only where there is a legal right. The presupposition of legal right carries with it the necessity of remedy. There can be no legal right without some kind of legal remedy. Wherever a legal right has been violated the law presumes injury therefrom and gives remedy therefor. You will further along find that is an important rule. The law does not confer or create legal rights for nothing. It does no vain thing, and if the legal right exists and that right has been violated, it provides a remedy. It does not make any difference what the nature of the right or of the violation is, when it is shown that the legal right exists and has been violated, the law steps in and presumes that some injury has resulted, and gives a remedy, You will find that in some cases in order to redress a wrong the parties must show the amount of . . the injury. Nevertheless, the law has already presumed the injury, although not the amount.

The means provided by the law to prevent the violation of rights is usually one of two classes: first, the prevention, and second, the redress. The redress may be either (a) specific or restorative, or (b) substitutional or Compensatory.

If we were to provide a new skeme of law you would probably say that the prevention scheme would be more valuable than the redressive. That is perhaps true. But as a matter of fact, if you will stop and run over in your mind the nature and number of the cases where the law attempts to give remedies by prevention, you will find them few indeed. The only remedy by prevention is by injunction. In certain cases the law will step in and issue a writ of injunction, and restrain a party from doing a certain thing. This is true, however, of a very limited number of cases. The injunction will not be issued where the party has some other legal remedy. As a matter of fact the great majority of legal remedies belong to the second class.

The best kind of remedy in the field of redress is the first, the specific or restorative, if the wrong has been done to do all in our power to restore the wronged party to his original position; if something has been denied a man to give him that thing. That would be the ideal way. In some cases the law does give this specific redress, but it is only in a very small field. Ordinarily there can be no redress, as in the case of personal property. So we have the second class of remedies. Where the law cannot give us the thing of which we have been deprived, it makes substitution for that to which we are entitled. We cannot get the thing itself or the ideal thing, and so we must take the substitute. It is in this latter field that our subject lies.

The compensatory remedy is an award of damages. Damages is a sum of money awarded by law as a compensation for the violation of a legal right. As a matter of fact, damages is always a sum of money, and whenever we get damages, we get it not specifically or by way of restoration, but as a compensation. Take this as an illustration: I give my promissory note for a certain sum. I fail to pay the note when it comes due. I have violated the right of the owner of the note for the money. The law does not in such a case give the money, or compel the payment of the note, but it awards damages for the non-payment. It is something by way of compensation for the non-performance of the contract. You will see what an ill-fitting and comparatively difficult remedy this is. The law deems money the most valuable thing a man can have and it awards money as compensation for the violation of rights of all sorts. If a man's honor has been attacked, you cannot restore it to him; the only thing to be done is to make a money compensation.

Money seems to be a sort of universal solvent in law for all kinds of injuries. Its only justification is the fact that it is the only practical compensation.

Damages are capable of calssification along two lines. There are certain cases where the amount to be awarded is material, and where the amount only is involved, the question how much. But in the great majority of cases the question is not of the amount, but for what injury, for what period of time, for injuries how closely related to the wrong that has been done. The latter kind seems to depend more upon the nature of the wrong and the nature of the sum to be awarded. The amount is simply a matter of mathematical calculation, a rough estimate of what the loss is.

In amount, damages are nominal or substantial, or they are compensatory or exemplary. In nature, damages may be general or special, direct or consequential, present or prospective, liquidated or unliquidated. Now each one of these classes of cases is made from a different standpoint, and it sometimes happens that you can included two or three branches in one case. In the same case damages may be both nominal and substantial, or compensatory and exemplary. Damages are nominal when some trifling sum is awarded in recognition of some right. They are substantial when an appreciable sum is awarded as compensation for the injury. Suppose a right has been violated but no damages can be shown to have resulted. In order to show that the law does recognize the right and protect it the law gives a nominal sum as damages. The law will invariable give nominal damages as a recognition that it does protect the right, even though no damage can be shown to have resulted. If you can show that actual injury has been done, then substantial damages are awarded. Substantial damages are an appreciable sum proportionate to the injury done, and intended to compensate for it.

Damages are compensatory when they are awarded simply by way of compensation. They are exemplary when they are awarded by way of punishment. Many states do not recognize this class of damages. In many cases where it appears that the injury has been inflicted willfully, maliciously, the law awards the full compensation to the party injured and also exacts exemplary damages by way of punishment and example.

Damages are general when they are awarded for an injury which must necessarily result from the wrong complained of. They are special when awarded for an injury actually, but not ordinatily or necessarily resulting from the wrongful act. The law distinguished between those things which must necessarily happen those damages of which the law implies necessary consequences,

and those in which special injuries are inflicted. If you wish to recover for some special, unusual thing, the damage is special.

Damages are direct when awarded for an injury which results directly and immediately from the wrongful act. They are consequential when awarded for any injuty resulting naturally but indirectly from the wrong.

Damages are present when awarded for a loss which will accrue in the future from the wrongful act already committed. Damages are liquidated when their amount has been ascertained either by the agreement of the parties or by the judgment of the court. They are unliquidated when their amount has not been ascertained as yet.

We shall take up each of these damages and discuss them more fully. This view of the general cases will perhaps serve to make more clear the specific subject which we take up afterwards.

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L E C T U R E II.

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II. Nominal and Substantial D amages. Nominal damages is a trifling sum, usually six cents, which are awarded whenever a right to recover some damage is clear and no amount has been or can be proved.

There are a lot of phrases used in connection with this subject, sometimes accurately, sometimes inaccurately. It would be a great gain if everybody would use all terms with some degree od accuracy. Here we have the word "damage" meaning loss, and "damages" meaning losses, and "damages" meaning compensation for these losses. You very often find this word in the plural where it simply means the loss or the injury. Often in the same sentence the word is used in two different senses, in one case meaning the injury, in another the compensation for the injury. You must keep in mind the fact that the courts are using these two words in a variety of meanings. We use "damages" both with reference to the loss, and the compensation for the loss. We are using the word now in the latter meaning.

Other phrases are: "Damnum absque injuria," "loss without wrong;" and "Injuria sine damno,""wrong without loss". It is frequently said that either one of these things can exist in the law. It is clear enough that the first does, but I do not think the second can. To illustrate the first: I have a business and someone sets up a rival establishment and wipes my business out of existence by competition. The mere fact that I have suffered loss does not mean that anybody is liable for it. There may be an extensive loss and yet no wrong. I think the second is never true, that is, wrong without loss. There must be some loss actual or presumed. Whenever there is some wrong it can never be unaccompanied by some kind of loss. The law never recognizes the existence of a legal wrong without some loss following from it. The very fact that it is a legal wrong shows that some injury has come from it. The very notion of a legal wrong is a wrong for which there is some remedy.

Whenever a legal right has been invaded, whether by the breach of a contract, or the commission of a tort, the law conclusively presumes that some injury has been sustained thereby, and will award nominal damages at least, though no actual damages are proved.

I think that rule is absolute, without any exception whatever. If a legal right has been violated in any way, the law gives some compensation for it. It is just as true in the case of a contract as in the commission of a tort. The very breach of a contract is in, law, the violation of a legal right, and the law will award at least nominal damages for the breach. Even where a party commits a breach of contract through carelessness, forgetfulness, or neglect, and there can be no injury shown, the law will award nominal damages as a recognition of the right. If a man trespasses on my property, he does a weong, and even though I suffer no injury, the law will give nominal damages as a recognition of my right. This is of course necessary in order to prevent the destruction of rights. If one person may trespass on my property, others can, and they can make it a public thoroughfare. It makes no difference that no appreciable injury has actually occurred, or that the act has actually resulted in incidental benefit. If the act violates a legal right, the law deems it injurious and will award at least nominal damages, in recognition and protection of the right. If a man is choking to death and another hits him on the back maliciously, even though it results to the benefit of the choking man, it is the violation of a legal right and can be a cause for action.

In some cases wrong is not presumed until loss is shown. This is the case in wrongs resulting from negligence. In this class come also cases known as defamations of character.

		: Breach of contract.
	: Wrong :	
	:	: Tort.
Elements of Cause of Action- :		
	:	: Actual
	: Loss :	
		: Presumed.

When a legal right of a substantial nature has been violated, the principle "De Minimis non curat lex" does not apply. On this see the following cases:

Pullman v. Stearns, 30 Vt. 443.
Paul v. Schlesen, Vt.
54 N. J. Law, 589.
5 Hill, 175.

In the second case the facts were that an officer had committed a trespass in seizing some hay. In taking the hay he had used a forkwhich he had found in the barn. The question was whether that could be a subject for action. The courtheld that the damages were so slight that even if there had been a wrong committed the law would not concern itself with it on the principle of De minimis non curat lex. In the later case of Pullman v. Stearns, there

had been some machinery removed from the factory. In the removal some leathern strings in the belting had been destroyed. The court in this case instructed the jury that the injury done was so slight that even though there had been a wrong there could be no damage. The decision was reversed by the Supreme Court. In theNew Jersey case a man had taken away the reins to a rig hitched in front of a store as a joke. The party who owned the reins brought suit for damages. The court said he would dismiss the case if the party who played the joke would pay the cost of the reins at the time, which was about $3, on the principle ef de minimis non curat lex. But the court of last resort reversed the decision. The right to property, the court said, was an absolute right and the amount of the damages made no difference.

I wish to note also in this connection that there may be cases in which it is necessary to prove loss in order tonprove wrong. There are some cases in which the law does not deem a wrong to have been committed unless some appreciable pecuniary injury has been inflicted, and in these cases some actual loss must be shown to make a cause of action. Cases of negligence, the creating of nuisances, the speaking of words not actionable per se, are illustrations of this class. My neighbor builds upon his lot adjoining my residence a soap factory. As long as he does not make it objectionable, he has a perfect right to carry on the soap factory. It is only when I can show thathit has actually done me some injury that I can bring action. The case is not actionable in itself. It is necessary to show wrong, but when the wrong has been shown there is a legal remedy.

There are many cases tried where the plaintiff recovers nothing, where as a matter of legal right he ought to have nominal damages. The case is appealed and the higher court finds that nominal damages should be awarded. In this connection the courts distinguish between two classes of cases: one, where the failure to recover is the failure to recognize a right; in this case the court will send the case back; the other, where no substantial right is involved, such as a case of slander or negligence, where the actual injury has been exceedingly small; in such cases if the first court has not recognized the right to recover even the 6 cents, the higher court often refuses to reverse the decision. In many cases the question is simply a question of costs. The man who wins 6 cents damages wins his case just as much as if the damages amounted to $6,000. Ususally costs follow the victory and it becomes a serious question as to who shall pay them. The awarding of costs is a matter of statute. Ordinarily it is necessary to determine whether a party is entitled to nominal damages in order to determine his right to the costs.

Except where some question of permanent and substantial right is involved nominal damages become important chiefly as affecting the right to recover costs. Neglect of the jury to award at least nominal damages, at least where they ought to have awarded them, will not justify a reversal of the case unless such damage would carry costs. If under the statute a man cannot have costs, the court will not send back the case. If costs will follow damages, the case is usually sent back for reversal.

When damages are awarded in appreciable amount as compensation for, and in proportion to, the actual injury sustained, they are said to be substantial. Substantial damages include all nominal damages, and nominal damages will not be granted in addition. Nominal damages are merged into the substantial. Somebody has said that in the majority of cases the nominal damages are simply a peg on which to recover costs. In some states costs are not awarded unless the amount of the damages exceeds $100. If then a man received $100 damages and could add nominal damages, he would be entitled to the costs. But this cannot be done. The nominal damages are merged into the substantial, and where substantial damages are awarded, no additional nominal damages will be given.

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L E C T U R E III.

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III. Compensatory and Exemplary Damages. It is a fundamental principle of the law of damages that the party injured shall receive compensation for the actual injury he has sustained. This is always the rule in the case of breach of contract and usually in the case of tort.

You will recall from the diagram we had on the board on the first day that the ordinary case cannot give specific or restorative redress, and the usual method is to give something else by way of compensation for the loss sustained. This is called compensatory or substitional reward. The guiding star of the whole subject of damages is to give compensation for the actual injury sustained, to give no more and no less. Full compensation, adequate compensation, no more and no less is the aim and object of the law of damages. We have to deal now with an exception to that rule, an exception that does not everywhere prevail, and which, even in the states in which it does prevail, is not always adhered to. The aim and the end of the law of damages is to fully compensate the party for the actual injury sustained. Something less than half a century ago the idea began to get foothold in the law that something more than compensation might be awarded. There are cases in tort where tort is not only the result of negligence or of inattention, but is the result, apparently, of intention, where the tort has been committed wilfully, intentionally, cruelly, and carried away by righteous indignation in cases of this kind, courts have not been altogether fair in the award of damages. There was a time when the jury was deemed to judge of the damages and the court could not interfere. It is very easy to see how in cases where the fact of the wrong was such as to arouse their indignation and that very much larger damages were awarded. But courts now feel at liberty to set aside the verdict of juries. But in many such cases the court may be influenced by the same indignation. So that, as a result of a variety of causes of this sort, an exception has crept into the law to the effect that when the injury was cruelly, wilfully, maliciously inflicted, the jury could award more than the amount of the actual loss. This was on the theory that the party should be made to suffer for the wrong he had committed. The idea that the civil courts should punish a wrong seems an anamaly, the punishment of a wrong criminally in a civil court. In some states

the courts have declared that the jury in civil cases should not be allowed to punish wrongs and that there should be no exemplary damages. In other states the courts have tried to avoid some of the difficulties as in Nebraska and Indiana. If the offense which is the basis for the civil act is one for criminal prosecution, the offender cannot be fined. In the majority of states the offender can be punished in the cicil court and also in the criminal.

Where, however, the tort has been committed under circumstances of gross negligence, wantonness, malice, insultor cruelty, the law in many states permits the recovery of additional damages --

intended to punish the offendor or to make an example of him as a warning to others. Damages so added are called exemplary damages, vindictive, or punitive damages.

The very idea of this damage is apparent in the name. Exemplary damages are never awarded except where some of these characteristics appear. In ofdinary cases where there is no gross negligence, no malice or cruelty, the vindictive damages cannot be awarded. It is only in cases where thes additional element appears. In the case of negligence, the negligence must be gwoss indeed to justify exemplary damages. The negligence must be so great as to amount nearly to intenetional negligence.

The right to recover such damages seems to prevail in Alabama, ArKansas, California, Dakota, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Mississippi. Missouri, North Carolina, New Jersey, New York, Ohio, Pennsylvania, South Carolina, Texas, Virginia, Vermont, West Virginia, and Wisconsin.

The right is denied in Massachussetts, Michigan, New Hampshire, Nebraska, and Washington. In Colorado, where the courts have decided that exemplary damages could not be recovered, the rule has been changed by statute. In a few states exemplary damages cannot be reoovered for a tort which may alsobe punished as a crime. In a few the fact of criminal punishment may be shown in mitigation of exemplary damages. In some states exemplary damages cannot be awarded at all; in some exemplary damages may be shown in mitigation of criminal punishment. But in some, no such distinction is made, and even in those states where exemplary damages are not allowed nominally, much the same result is reached by allowing liberal damages for injured feelings and pain of mind.

You can readily see by this enumeration that in most of the states exemplary damages as such can be recovered. In a few states they cannot be recovered where the act is a crime. In a few others, the fact that the party has already been punished criminally will act as mitig ation. In many states exemplary damages are not allowed at all, but even in these states damages are allowed for injured feelings. I think that anybody who looks at the matter in the abstract will find the whole theory of exemplary damages erroneous. In the court in Colorado it was stated that the popular

feeling seemed in favor of exemplary damages, while the law seemed drifting away from it.

Distribution of powers as between the court and the jury. The question of whether or not exemplary damages are to be awarded and how much is almost exclusivoly a question for the jury. But before the question goes to the jury there is almost always a question of law involved, that is, whether there is any evidence upon which a verdict for exemplary damages might be awarded, or, in other words, whether the act was wilful or malicious. If the court decides there was no evidence as to wilfulness or maliciousness, then the question cannot go to the jury at all. The decisions of the court in this respect can be repealed by a higher court. If the court decides that there was some evidence to this effect, then it is a matter for the jury to decide whether the evidence is sufficient. Whether there was any evidence at all is a question for the court, but whether there was evidence sufficient to justify the jury in deciding whether it was maliciousness or not, is a question for the jury. The question has given rise to considerable controversy as to where to fix the boundary line between what may be regarded as evidence and what cannot. A very small iota of evidence might be called sufficient evidence to justify the court in referring the question of maliciousness to the jury.

Suppose that the court finds that there is no evidence. The jury finds that the evidence is suffidient to warrant the conclusion that the act was malicious. The next question is how much is to be awarded by way of punishment. As to that, of course, there can be no rule laid down. In general, the question is in the discretion of the jury. But the jury may have awarded a damage so excessive that it can only be justified on the ground that the jury abandoned all discretion, and where there is evidence that that was the case, the courts do exerdise some control. But so long as it does appear that the jury has acted upon its judgment the courts do not interfere. The courts are very loath to interfere in any case. It is only when the verdict is apparently unjust and excessive. The court is not passing upon the damage, and although the court may not agree in the verdict of the jury, still the matter is one at the discretion of the jury and the court is very unwilling to interfere.

The amount to be awarded by way of damages cannot be fixed by rule. It is left entirely at the discretion of the jury to be exercised in view of the circumstances of the case, subject only to the limitation that it shall appear to have been dictated by their judgment, and not by their passions or prejudices.

Now exemplary damages are substantially never awarded for mere breach of contract. There is one apparent exception to this rule. Whether it is a proper exception is questionable. The exception is the breach of contract to marry. There may be a case where the act is simply the breach of a contract, but there are others where the breach may be due to maliciousness. With the exception of breaches of contract to marry, exemplary damages are not allowed for the mere breach of contract. It is only where the breach is accompanied with the tort feature that exemplary damages can be awarded.

Exemplary damages are not recoverable against insane persons, or against infants or young persons, too young to be chargeable with the malicious and wanton intent. You can readily see the reason for this. The insane person is liable for his torts. He is liable for the damages and no more. In the same way you cannot punish an infant. He is liable to make compensation for his torts, but if he is so young that he cannot have undertaken the intent, he cannot be punished.

Exemplary damages are not recoverable after the death of the wrong doer. If the wrong doer had lived, he could have been assessed actual damages, and besides, exemplary damages. But the law does not attempt to punish men who are supposed to have gone to their reward. If the man dies, he gets his reward somewhere else.

Exemplary damages cannot be awarded for injuries caused by mere negligence, ignorance, or mistake. There must be willingness malice, or neglignece so great as to indicate wanton disregard of the rights or feelings of others.

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L E C T U R E IV.

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I was afraid I had not laid sufficient emphasis in the last lecture upon the relative positions of the court and jury in this matter of damages, so I will briefly repeat what I said thon to avoid misunderstanding. We saw in the last lecture that so far as the question of evidence was concerned it was a question of law for the court to determine, but on the other hand, whether thenevidence was sufficient to show that the act was wrongfully, maliciously, and wilfully done, was a question for the jury. The question of amount, I think I stated was purely in the discretion of the jury. Not only the amount, but also the question as to whether exemplary damages will be awarded at all is in the hands of the jury. They are not obliged to award exemplary damages. The amount is wholly in their discretion. The court cannot instruct them to award exemplary damages. In a few cases where the court has used the word "ought" in its instructions, instructing them that they ought to award exemplary damages, that word was held too strong.

As far as actual damages are concerned, they are a question of strict legal right, but there is no absolute right to exemplary damages. Actual damages must be awarded, exemplary damages may be awarded or not at the discretion of the jury, even when they have found the wrongful act to have been committed with wantonness, wilfulness, malice. Of course the jury in this matter must act with judgment. They must not allow their feelings or prejudices to run away with them.

In this field of exemplary damages are several questions we have not yet touched upon, important among which is the question of the right to have exemplary damages as against public or municipal corporations and against private corporations. As regards the public corporation, that may be disposed of in a few words. If the public corporation has a servant that commits some wrong, there are many cases where the corporation is liable for his torts, and others where the corporation is not liable. If the public is made responsible for the acts of its servants under certain circumstances the burden of this responsibility must of course fall upon the people in the shape of increased

taxation. The question arises as to whether it is just for the government to punish the taxpayer for the wrongs committed by its servants after full compensation has been made. The courts have held that it is not. The public has not duty to punish itself because one of its members has been guilty of wrongful, malicious, and wanton acts. The public will award full compensation, but it will not punish itself or its taxpayers for the wrongful motives of its servants or agents. Of course there are many cases where the public agent may himself be responsiblo, where he can be held responsible, but not the public. There are still cases where both may be held responsible. Where he alone is held responsible, of course he alone can be punished, and not the public.

Exemplary damages cannot be awarded against municipal corporations for the wrongful acts of their servants or agents, but the public servant or agent himself may be charged with exemplary damages in proper cases.

In regard to private corporations the case is not so clear. If we should go back I think we would find it difficult to give the reason why the master or principal should bo held liable for the wrongful acts of his servant or agent when he himself is not at fault. But that he is liable is abundantly and conclusively settled by the authorities, though we can give no reason for it. It makes no difference if the employer has done everything in the selection of his servants or in their instruction, if one of them is negligent, or wilful, or malicious in the exerciso of his authority, the master or principal, though he is not in the slightest degree at fault, is held responsible for the act. When we c arry the question still further and say that the principal is also liable for punishment for the wrongful motive of his servant, the injustice appears great. When the principal has given substantial damages, the law ought to be satisfied. He ought not to be punished when he has done everything to make amends. But it is held that if the principal is responsible for the substantial damages, he is also liable for the exemplary. The cases are pretty evenly divided on this question. In a case decided in Maine the court held very emphatically that every reason of public policy required that at least so far as corporations were concerned, they should answer in exemplary damages for the wrongful and wilful acts of their servants. The United States Supreme Court, however, has held just as decidedly that where a railroad is not a t fault, where it has done everything it could do, that full justice has been rendered when compensatory damages have been awarded. They reason that if the corpora-

tion has not in any way participated in the act, then there is no reason why the corporation should be made responsible. They draw a distinction between the servants and the more intimate servants or directors. Certain of the agents of the corporation represent it more directly than others. The courts draw a distinction between these two classes, and hold that if the act is done or ratified by one of these persons who represent the corporation more directly the act becomes the act of the corporation. But the malicious act of the hired laborer is not the act of the corporation and unless the corporation has entered into that act there is no way in which the corporation can enter into the malice. Unless the malice can be attributed to the corporation, unless it can be shown to be due to the corporation through some act of the corporation as such, the corporation cannot be held liable for anything more than substantial damages. Another set of cases hold that the principal is responsible for exemplary damages just as much as for substantial damages, that the act of the employee is the act of the principal. The doctrine of the Maine case is popular and has been adopted by the courts in many states regardless of the question as to whether the corporation did or did not enter into the act. If the corporation is liable for compensatory damages it is also liable for exemplary. It is true that in the Maine case, the case of Goddard v. Grand Trunk R.R. the court lays some emphasis upon the fact that there was ratification, that after the brakeman had committed the act and it had come to the notice of the company the company still retained the man and seemed to assume the act. But it is clear from the case that the court's decision was not grounded upon that fact.

The extent to which private corporations can be held liable for exemplary damages for the wrongful acts of their servants and agents is in dispute. It is held in one line of cases that the corporation can be so liable only when the wrongful intent can be attributed to the corporation itself, as where it participated in, authorized, or ratified the act.

This seems to be the rule in Ala., Cal., Del., La., Mich., N.J., N.Y., Ore., Pa., R.I., W. Va., Ta., Wis., and the Supreme Court of the United States. The Louisiana court put the matter in this way: A person is never liable for punishment by means of an award of damages for any act for which he was liable by relationship merely. Simply by virtue of the relationship the malicious act cannot be attributed to the party who is the agent's principal. This rule is in my judgment the true one, although it is not held in many of t e states.

The other rule is that the corporation is liable for exemplary damages for the malicious, wilful, or wahton act of its servants or agents if they were acting within the scope of their employment and in the line of their duty, though the act had not been previously authorized or subsequently ratified.

In other states there in no distinction made. This seems to be the rule in Ark., Ga., Ill., Kan., Ky., Me., Ma., Miss., Mo., Nev., N. H., O., Sc., and Tenn.

No definite rule can be laid down as to the different states in this matter as there is still a great deal of uncertainty. The rules given above show the tendency in the different states, that is all.

The rule seems to be the same in t'ese respective states as to the liability of any principal to exemplary damages for the acts of his servants or agents.

Inasmuch as exemplary damages are only allowed where there has been a wrongful motive, it is always competent for the defendant to show if he can that the act for which exemplary damages are claimed was committed by accident or honest mistake, or in good faith, and thus to reduce the damages to compensation merely.

The defendant may also show in mitigation of exem plary damages that his act was provoked by the plaintiff.

There is one more feature which we have to dispose of and one which is giving the courts considerable difficulty. That is whether or not there must be in the case in which exemplary damages are sought some foundation for substantial damages as well as for exemplary damages. The question is whether where there are merely nominal damages the jury can add the exemplary damages. Some courts hold that they can, but the great majority hold that you cannot assess exemplary damages unless there is some substantial injury. In eme states the courts hold that where there is no damage at all exemplary damages can be added.

Exemplary damages by the weight of authority cannot be recovered where the actual injury which the plaintiff has suffered is merely nominal.

It is not necessary that the plaintiff in his pleadings shall expressly claim exemplary damages; if the facts show that he is entitled to them, it is sufficient.

Of course in the great majority of cases it would be necessary to allege and show that the act was malicious and wanton or wilful. But it seems not to be necessary as a mere matter of pleading that the plaintiff shall expressly and separately and in terms demand the right to recover. If he is entitled to t em he may have them though there is no express pleading.

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L E C T U R E V.

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Iv. Of General and Special Damages. One of the difficulties that many of us fine in attempting to deal with these classifications is, that we do not realize that they re classifications that are made from an entirely different standpoint. It depends upon the point of view from which we approach the subject. Our damages are Direct and Consequential, lokking at it from one standpoint. They may be General or Special. Now this latter division is made purely from the standpoint of pleading. Take the distinction between Nominal and Substantial, and Compensatory and Exemplary damages. These divisions are made from an entirely different standpoint. We must get it out of our minds that in some way we are going to reconcile all these classifications.

Today's classification does not depend so much upon the nature of the damages, as upon the manner in which they are pleaded.

The distinction between General and Special Damages is chiefly important as a question of pleading.

Let us see how it will become important as a matter of pleading. What is the purpose of pleading? The purpose of the plaintiff's pleading is to apprise the defendant of his claim, and the amount he intends to recover in this action. If there are some things that the law will presume that the defendant is already aware of, the plaintiff does not need to plead them. I sue a man for Assault and Battery. It is not necessary for me to plead that I was hurt. The law presumes this. The law presumes that a person in such a case must know what the necessary and ordinary consequences of his action will be. On the other hand, a man has made a contract with me to supply certain goods, and fails to supply them. Now I have lost the benefit and value of the goods. Now I say on the trial that I had a contract with Mr. A. to supply the goods at a very much advanced price. Here the law would say that the defendant is not bound to know that I was going to sell these goods at an advanced price, and for the particular purpose for which he expected to use them.

Certain consequences always or necessarily follow from certain kinds of injuries. On the other hand, there are certain consequences which may follow from the doing of a certain thing, which would not ordinarily follow. They are not so ordinary that they can be said to be the necessary consequences. So, if a

party wants to recover them, he must apprise the defendant in his pleadings that he will seek for these unusual consequences. He must allege it. If it is a loss that has happened in this particular case but which would not ordinarily or necessarily happen then you must set it out. When you ask, "With how much particularity must I set it up?" there is no definite rule. The rule is satisfied if the pleading contains sufficient particularity or minuteness to reasonable apprise him of the fact that you are seeking to recover for this unusual kind of damage; what it is; and the extent. You must use a reasonable degree of certainty. And what is reasonable depends upon the particular dircumstances of the case. So you see it is almost entirely a matter of pleading.

General Damages being those awarded for injuries which necessarily result from the wrongful act complained of, may be proved and recovered under the general allegations in the pleadings, th at damages have been sustained.

The law presumes that the defendant is aware of the necessary consequences of his act, and therefore cannot be taken by surprise by the proof of them.

It is sometimes said that General Damages as distinct from Special Damages are those that the law implies or presumes. If they are so ordinary that the law can say that the defendant will be presumed to have had knowledge of them, then theyare general.

But Special Damages, which are those awarded for injuries which do not necessarily result from the act, but have resulted in this particular case, cannot be recovered unless the particular injuries have been specifically alleged in the plaintiff's declaration or complaint.

The law does not presume that the defendant is aware of consequences possible but not necessary, and therefore to prevent surprise re quires them to be alleged.

These principles are the ones which guide the courts in all cases. It is sometimes difficult to tell whether the particular injury for which the party seeks to recover is one in which the law will presume the results. The criterion is: "Is t is particular injury one which would naturally result from this kind of act; is there anything peculiar about this case which made it possible this result would happen which would not make it necessarily happen in some cases?" If it is, it would be Special Damages, and should be alleged. If you are in doubt about it, give yourself the benefit of it by alleging Special Damages.

V. Of Present and Prospective Damages.- I think that this is the most difficult matter that we shall have to deal with in this class relating to damages.

1, In order to constitute a cause of action, there must coexist a legal wrong and a loss resulting therefrom. That wrong

may be either a direct invasion of an absolute right, or the violation of some imposed duty, or the breach of a contract.

The loss may be one either which the law implies, or one which the plaintiff must establish by evidence.

Where such wrong and loss coexist a right of action results, and the law seeks to avenge the wrong and to compensate for the loss by the award of damages.

Every cause of action, and the damages which may be recovered on account of it, constitute an individual entirety.

WRONG--LOSS--DAMAGES.

You must have both the wrong and the loss in order to have damages. You cannot split up your cause of action; you cannot split up your loss; and you cannot split up your recovery. You have got to get it all at once, or not at all.

Where a cause of action exists and an action for damages is brought upon it, the party entitled must in that action recover all the damages to which he is or ever can be entitled by reason of that cause of action.

Every cause of action must be complete at the time suit is brought upon it; and matters occurring afterwards cannot be used to perfect the cause of action.

Where a man sues it goes without saying that he must have a cause of action. And there must be a complete cause of action. A man cannot sue upon a contract before the contract is broken. There cannot be an action maintained on a tort until a cause of action has taken place, a tort has been committed. And the suit means a cause of action and some loss.

But while this is the case, it is not necessary that all the result which happens from that one wrong shall have happened before the action is begun. In many cases it may happen even after the case is tried, in the future. But there must be a complete cause of action when suit is brought.

It is not necessary that all the consequences of the cause of action shall have happened at the time the action is brought. There must be a complete injury at the time the action is brought; it is not necessary that all the loss shall then have accrued. The wrongful act must be committed before the action is brought; but the loss may happen in part afterwards.

But if, before the loss in question happened, the wrong has been satisfied, released, or barred by statute of limitations, then there can be no recovery for that loss.

The case of National Mining Co. vs. Minn. Mining Co., is an American case that I want to compare with an English case as bearing upon this last proposition that I gave you. There were two mining companies that had mines upon adjoining property. The plaintiff when it reached the line which separated its mine from defendant's stopped operations purposely from fifteen to twenty feet before it reached the line, so as to be sure that a thick wall was left between its mine and the defend-

dant's mine. The defendant mining company, however, when it came up ot the line mined clear up to the line and then at one place went clear past the line into plaintiff's wall of rock until they pierced through that wall of rock. Nobody knew when this was done it appeared sometime in 1871 or 1872. They both went on mining. By and by the defendant mining company abandoned mining in its mine, and took out from the various chambers in the mine the supports that hold up the roof, and allowed the mine to cave in, and as it caved in the surface went in in various places. After eight or ten years the plaintiff mining company found that its mine was being flooded with ater; and they put in various sorts of pumps and tried to get the water out, but could not do so. They searched for the cause, and found that a great hole had been formed fifteen or twenty feet in diameter between defendant mining company's mine and its own mine. They found a stream of water six or eight feet in diameter flowing through the other mine into theirs. They brought an action to recover. The Statute of Limitations in this state provided that all actions of trespass should be brought within two years. It was evident that the cutting had been done at least ten or twelve years before, so that the wrong itself had been done before any loss happened. The question was whether the loss could be attached to that trespass so as to make the defendant liable. The Sup. Ct. held that there could be no recovery in that case because there had been no new wrong. When the wrong had been done nobody could anticipate this loss would happen.

In a very recent English case it appeared that some coal mining company had a right to go over the ground, while somebody else went beneath the surface. In this case the coal had been all taken out. Some of the supports had been taken out, and injury done. Defendant voluntarily made amends for this wrong. It went along about fourteen years. Somebody had some rights in the adjoining property. When he came to take out his mineral it appeared that the mineral in the adjoining property furnished some support for the surface of this mine. When this mineral was taken out, the support was taken away, and damage resulted. It was contended that the taking away of the supports was done fourteen years before, that the action was barred by the Statute of Limitations, and that there could be no recovery. In the House of Lords it was held that there could be a recovery. The court said that the wrong in the Michigan case was going there and taking away the rock, and leaving the excavation. That the wrong in the English case happened when it appeared that there was not enough left to support the surface. Nobody could tell whether the defendant had done any wrong until the surface fell in.

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L E C T U R E VI.

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It was formerly the rule that damages could be computed in personal action up to the time of commencement of suit but the rule now is that all damages, past, present, and prospective which result from one cause of action must be recovered at one time and in one action.

See Darley Main Colliery Co. v. Mitchell, H.L.Rep.XI,127

In this case the owner of the surface of a particulartract had leased the seams of coal beneath the surface to the colliery company on condition that he was not to be disturbed in his enjoyment of the surface. Due to insufficient precautions to support the surface, part of it fell in in 1868 and the owner sued for and obtained damages. Later, in 1884, due to the same cause, another portion caved in and the owner brought a new suit for damages. The case was decided against the plaintiff, whereupon it was appealed and a judgment for the plaintiff was obtained for damages to be assessed by an arbitrator. Against this judgment the defendants appealed.

On this case Lord Bramwell said: It is a rule that when a thing directly wrongful in itself is done to a man, in itself a cause for action, he must, if he sues in respect of it, do so at once and for all. As, if he is beaten or wounded, if he sues he must sue for all his damage, past, present, and future, certain and contingent. He cannot maintain an action for a broken arm, and subsequently for a broken rib, though he did not know of it when he commenced his first action. But if he sustained two injuries from one blow, one to his person, another to his property, as, for instance, damage to a watch, there is no doubt that he could maintain two actions in respect of the one blow...It cannot be said that the act of excavation is unlawful. A contract to do it could be enforced. No injunction against it could be obtained unless injury from it was imminent and certain. What would be the rights of the person damaged in such a case? I think the former reasoning would apply. If there was an excavation 100 yards long, and fifty feet of the neighboring soil fell in, the right of action would in respect of those fifty feet, and not only in respect of what had fallen in, but what in the future would fall in along the fifty feet. But if

afterwards other fifty feet fell in there would be a fresh cause of action. Surely this must be so."

In this case the act itself was wrong. The defendant had the right to take the coal. The right, however, was conditional upon leaving sufficient under the surfact to keep it up. The defendant omitted to dothis. If the taking away of the soil under the surface was a trespass, the d ecision of the court would have been different. The defendant in this case however owned the mineral conditi oned upon his keep ing up the surface. If the surface was not maintained, there was wrong and cause of action. The wrong and loss must coexist. Now the defendant must recover all the loss in one action. The necessity of having some sort of fixed rule, some limit to the time in which action can be brought have given rise to this limitation. The rule seems to be absolutely fixed that for one wrong there aan be but one action, and in that one action you must obtain all compensation for all that you have and that you will suffer. The mere fact that after you have mai ntained an action you find that you have suffered still further loss from the same wrong does not give another cause for action. There is a loss, but no wrong in the second case.

There are some exceptions to this rule, though they are rather apparent than real. These exceptions arise in cases where, for example, one of two adjoining proprietors trespasses upon the land of his neighbor and erects a building there, or some temporary structure. The act is itself a trespass. It is a wrong and the defendant can recover at least nominal damages. But if the trespasser stays there, there is additionalwrong. If he has taken timber and piled it on the plaintiff's land, the placing it there was wrong in itself and a cause of action. The leaving of the timber there is a new cause of action, a new injury. Every day that the timber is left there, there is a new wrong, a new cause of action. In cases of that nature, instead of being one single wrong, it is a series of wrongs. The effect of such wrongs is to give rise to a series of causes of action. Now it is not necessary for the plaintiff to sue every day. He may wait for weeks. The period of action will be the period intervening between the last action and the present one. If a period of one month intorvenes between the two actions, the period for which damages can be recovered in the new action is one month.

Some courts reason in this way in regard to this matter: While it was wrong for the defendant to go on the plaintiff's property in the first place and leave his property there, still

he has no right to enter his neighbor's property to remove it. If he enters the property to remove his own, he commits another wrong. The law does not ask a man to commit a wrong in order to right another. Therefore the two causes of action balance each other. But the weight of authority is on the side I stated first.

In the general case the plaintiff recovers in one action all that he will ever recover. In this class of cases there is a continuing trespass, and the recovery will be from the last action to the present.

An apparent but not real exception to this rule is that in action for continuing trespass, the nuisances which may be abated, damages can be computed only up to the time of the commencement of the suit. In these cases, for every day after the commencement of suit during which the trespass or nuisance is continued, there is a new wrong, and a new right of action, and suits may be successively brought until the trespass or nuisance is abated.

There is no doubt at all about the general rule. There is difficulty, however, in determining whether or not the trespass or nuisance shall be deemed to be a continuing nuisance or a permanent.

This question was involved in a case which arose in Iowa some years ago. A railroad had constructed its roadbed along and adjacent to the plaintiff's land. At the point in controversy quite a high embankment had been constructed. At that point a small stream flowed into the plaintiff's land and after traversing it in the loop flowed off through the roadbed. This stream gave him important watering rights. The railroad company, building its track in a straight line, crossed the creek in two places by bridges. After a while one of the bridges was replaced by an embankment. This injured the plaintiff, causing a backflow upon his land. The court held in this case, that it was one of those continuing trospasses and that the plaintiff should recover only upon the commencement of the suit. The defendant appealed and the decision was confirmed. Some years after the original owner died and bequeathed the property to his sne. The wrong continued. The son brought another action for the injury since the commencement of the first suit. The defendant took the construction that the original construction of the court was erroneous and th at the court should have decided that they recover for all time, instead of only since the commencement of the first suit. The Supreme Court sustained the defendant's position, that the nuisance was a permanent one and that the plaintiff must recover once and for all. This case shows the distinction between the two classes. The rule applies almost

exclusively in the case of streets, canals, and structures of permanent and public character.

There is a case in New York, where the same question is involved.

Uline v. N. Y. Cen. R.R. 101 N.Y. 98.

In this case the New York Central in building its tracks has changed the grade of a street to the injury of the adjacent property. The plaintiff recovered damages. Later another track was put in, necessitating another grading. Another suit for damages was brought. When this case was tried in the lower court, the court held that the case could net be deemed to be a continuing trespass. They held that it was a permanent encroachment and the plaintiff could recover all the damages she sustained before or after at one trial.

Another case of the same character but differing in the verdict given is that of

North Vernon v. Volger, 103 Ind. 314.

In some states it is held where the cause of the injury is of a permanent character not easily abated, like railroads, canals, and streets, damages both permanent and prospective are to be reocvered in the one action and this recovery will be treated as a license for the continuance of the cause of injury. This rule has been enforced in New Hampshire, Iowa, Kentucky, Kansas, Indiana, and Illinois. But the weight of authority does not recognize this distinction. Except, therefore, in these cases of continuing trespasses and nuisances the party injured is entitled to recover damages not only up to the commencement of the suit, but also for such losses as he has sustained from the same wrong up to the date of the verdict and also such future damages as he can show he is reasonable to suffer in the future from the dame wrong.

The proposition needs one word of qualification. I say such damages as he is reasonably certain to suffer from the same wrong; not uncertain ot speculative damages.

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L E C T U R E VII.

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In the last lecture I was dealing with the question of present and prospective damages, the specific question being the time to which the damages should be assessed in that action. You recall that in a great many classes of cases damages were to be assessed up to the commencement of the suit; in other cases damages were to be assessed in one action for all the past, present and future injuries. What was said in the last lecture related chiefly to damages for the commission of torts, or for other wrongs than the mere breach of contract. Something remains to be said under the general heading of the time to which damages can be assessed for breach of contract. The line of distinction between complete, present, and conrinuing wrongs cannot be drawn so completely in the case of contract as in that of torts. There is also room for distinction in the case of contracts between single, indivisible, entire contracts and the divisible and separable contracts. For example: A agrees at a certain to sell to B a certain article. There is one thing only to be done, and in the nature of the case, there can be no division. There is one act to be performed. But suppose there is a contract to sell a dozen articles, as horses, instead of one. There is one agreement covering a number of objects. Is this to be treated as a number of agreements covering several objects? Is the contract to be treated as divisible? When the contract calls for different performances at different times the divisible nature of the contract becomes more apparent, as for example, an agreement to sell a horse on the first of June, a wagon at a later date, and so on. Then each agreement may stand by itself. It is a very difficult matter to tell in most cases whether a contract is separable. Once it is determined that the contract is separable, then there is a separate action possible for each breach. One of the most important distinctions in this field is between the separable and the entire contracts. If there is one agreement, as soon as it is unfulfilled a cause of action ensues, and the plaintiff must recover once and for all the damages to which he is entitled by virtue of the breach of that agreement.

If the contract is divisible in nature, being a combination of a number of distinct agreements, then a number of actions can be maintained for damages from each separate breach. Courts have not been able to agree on the matter of what shall constitute a separable contract and what an entire. Each case must, therefore, depend upon its own circumstances.

In the case of breach of contract, the period to which damages are to be assessed depends upon the nature of the contract and the time and circumstances of its breach. If the contract is entire, one action only can be maintained for its breach, and damages from all losses resulting from that breach must be recovered at one time and in one action.

If, under the law of Contracts, a contract is deemed to be entire, then the breach furnishes but one cause for action, and here, as in the case of torts, a man must recover once and for all everything that he is going to recover.

In contracts to work for a certain period of time at a certain wage courts have had difficulty in deciding whether the agreement was to be considered entire or separable. Another case in which courts differ is in the matter of running accounts. Some courts hold that such an account is a single contract. Others hold that it is a separable account, and a man may sue for each item of the account separately. If it is held to be an entire contract, the rule I have just given applies.

But if the contract is separable or divisible, aswhere one promises to do different things at the same time, or the same thing at different times, or different things at different times, then separate actions may be brought to recover damages for the loss sustained by each separate breach.

Where a contract of such a nature is not fulfilled in one of its items, then a cause of action arises, and you can have an action for that particular breach, and in that action you must recover all that you can recover for that particular breach. If a man agrees to build a number of houses for a certain price, and fails to build one of them, damages can be recovered for that particular breach.

There is something in damages quite similar to the continuing trespass. Where this is found, the same rule applies as in the case of trespass. Take an agreement of this kind: A man agrees to keep a house in repair for a certain period. He has undertaken to repair the house whenever it may get out of repair.

This is what may be called a continuous contract, a contract calling for continuous performances. A man agrees to keep a house in repair for ten years. At the end of one year he fails to make necessary repairs. Shall the plaintiff recover once and for all for that particular failure, and then sue successively for future failures? A case of this kind arose in New York. A man had promised to keep a certain gate in repair. He failed to keep upthe gate. The question was whether damages for the entire failure should be recovered, whether the breach was final and total, or whether it should be presumed that he would restore the gate. The court held there that the man would presumably repair the gate, and that the plaintiff could not recover for the total final loss.

There was case in Maine recently where a party agreed that for an interval of ten yeard he would not compete in business with the plaintiff. At one time he did engage in business, and suit was brought. The question was whether there was a final and complete breach of the contract and whether damages should be recovered for the entire ten years. The court held that this was one of those continuous contracts and each breach gave rise to a new cause of action.

A similar case arose in Connecticut, where a contract was to keep a certain cattle passage in repair. The defendant claimed that he could not be assessed damages for the injury except up to the time of the beginning of the suit, the presumption being that he would clear out the passage and keep it in good repair in the future. The court here also held that each breach gave rise to a new cause of action, and in any particular action damages could only be recovered for the particular breach.

If we could stop right here, the matter would present fewer difficulties. But there are cases where, notwithstanding the fact that the contract calls for this continuous performance, the breach has been of such a nature, ithas been so complete, as to indicate the intention of the defendant to annul the entire contract. There was a case of this kind in Massachussetts. A party had agreed to support another in his old age. He had failed to do so at one time. An action was brought for recovery of damages. The question was whether this was a total breach of the contract, so as to entitle the plaintiff to recovery for the breach for his entire life time, or whether it was only for the time that the defendant had failed to fulfill his contract. The court held that the presumption was that the party would resume his obligation, and that the damages should be asses-

sed.only for the period of non-performance. In a similar case a few years later the courtheld that the circumstances were of such a nature as to indicate a total and final bre ach of the contract, and that therefore the plaintiff should recover for the entire breach.

131 Mass. 31.
133 Mass. 74.

Where the contract calls for continuous or successive performances, as to do a certain thing regularly during a specified period, or not to do a certain thing at any time during that period, each breach usually gives rise to a new cause of action, and damages cannot be recovered as for the total breach of the entire contract.

70 Me. 221.
2.N.Y. 86.
43 Conn. 453.

But where the breach has been such that the plaintiff has the right to treat the contract as absolutely and finally broken, and he so selects to treat it, the damages may be recovered once and for all as for the total breach of the entire contract.

It is sometimes difficult to tell whether there has been a breach of this nature or not. On this see

6 Hill (N. Y.) 54.
31 Ver. 592.

Whether the contra ct has been finally and absolutely broken is a question of the fact for the jury.

Now there is another phase of this matter which requires consideration. A man agrees with another that the latter shall perform for him a service, as for example, build him a house. Now before the house is completed and very much has been done upon it the first person concludes that he would rather not have the house built. There may be a thousand things arise any one of which would be sufficient to make him change his mind. May he inform the second party of this changed intention and ask him to discontinue the work, paying him for any loss that may result or has the second person a contract for the entire house and has he the right to enforce it?

A party to a contract has usually the right to terminate performance by the other party subject to a liability to pay damages to the latter for the loss he may sustain thereby.

That is of course a general proposition. There was a case some time ago in Illinois where one of the parties tried to apply that doctrine (and here I want to note an exception to the

rule as given above based upon cases of this nature). B had agreed with A that at any time before the middle of the following April (this was December) he would take from A a certain number of thousand bushels of wheat and pay a certain price. Immediately after the contract was made the price of wheat began to go down, so that B saw that in all probability he had made a losing bargain. So the next day, after the signing of the contract, he came to A and said: I am not going to take that wheat and I want you to treat that contract as broken, and treat it so now. A refused to do so. In April the price of wheat had gone still farther down. If A could put in the wheat now he would make a large profit, resulting in a corresponding loss to B. If B could compel the contract to close up as of the day when he had repudiated it, his loss would not be so great, whereas if he took it the day it was due it would be much greater. The defendant in this case sought to compel the plaintiff to treat this as a present breach of a future contract. The court held that this was optional with the defendant. He was not compelled to treat it as a present breach of a future contract. He could recover damages as of the date when the contract was given. It seems to be a matter for the plaintiff to decide whether he will or will not treat such a matter as a final breach.

But where the notice of repudiation is given before the time for performance arrives, the other party may, but he is not obliged to treat it as a present breach. He may sue at once, or he may treat the contract as continuing in force until the time for performance arrives, and then sue for the actual breach if the defendant does not perform.

108 Ill. 176.
48 Am. Rep. 548.

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L E C T U R E VIII.

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VI. Direct and Consequential Damages. Direct damages are those awarded as compensation for injuries that resulted directly, immediately upon the wrongful act, while consequential damages are those which resulted naturally, proximately, circuitously. These words directly, indirectly, circuitously, it is well to bear in mind, are not used referring to time, but to the order of events; they refer to continuity, not to time. A result is direct when it follows in direct line from some cause; indirect, when there are intervening events between the first cause and the final effect. Take for illustration a case that arose in Massachussetts. A man had left his team unhitched upon the street while he went into a store. The team was frightened and ran away, running into another team and causing that to run away, and this second team causing another to run away. The third team ran into and injured a pedestrian. The question arose as to which team was responsible for the injury. The first team had not hurt the plaintiff, it had not seen him. But the defendant's team had started another, which had started another which finally caused the injury. Since the defendant's team set in motion a chain of events that finally resulted in injury to the plaintiff, it was a circuitous, indirect result. The difficult question is to determine how far the law will follow this chain of interrelated causes and events. It is plain the chain could be lengthen almost indefinitely. It may be that the final effect is so remote from the first cause that you must exonerate the party who really set the events in motion. It is not a question of time, it is a question of causes, whether the first cause was really the proximate cause of the injury.

This question is treated as a question of damages. It is not properly a question in this subject. It is a question of tort in the tort field, and a question of contract in the contract field. Properly speaking the question of damages is not whether or not there is a cause for action, but assuming a person liable, for how much is he liable. You see in these cases the question is not how much the plaintiff shall get, but whether he shall get anything at all. That is a question of tort or contract. But as it is so commonly placed in the damages field

and occupies so large a part of the field that I will deal with it here.

Now the law has certain arbitrary presumptions. We say sometimes that the law presumes that a man actually intends the direct consequences of his act. The law will not hear a man say that he didnot contemplate the result of his act. If the law did so, then every man would escape punishment. The direct consequences of the act must be deemed to follow. If I break a contract I cannot be heard to say th at I did not think the other party to the contract would suffer thereby. Whether we can say that a man just as certainly intends these indirect consequences is a difficult question. If a man leaves his horse unhitched in the street, can he be presumed to know that his horse will run away, cause some other team to run away, and eventually to injure somebody. In the ordinary case, where the consequence is immediate in point of continuity, the law does conclusively say that every man does contemplate and intend these consequences and holds him liable in such cases whether there is any actual intent or not.

A person who has caused injury by his wrongful act, whether it be a breach of contract, or a tort, is always liable for the losses which are the direct, immediate and natural consequences of the wrongful act complained of.

The law conclusively presumes that every person contemplates and intends the direct and natural consequences of his acts and holds him liable therefor, regardless of his actual motive or intention. Damages awarded for such consequences are called direct damages.

That is, I suppose, absolutely axiomatic in the law of liability and in the law of damages. That is the basis upon which the whole structure of liability must be raised. If we permit a man to say that he did not think or intend the consequences, then you have the wole matter resting upon a question which we cannot inquire into at all; we cannot inquire into the mental conditions that prompted any act. We cannot inquire into the motive except as manifested in outward acts.

The liability of the wrong-doer, however, is not necessarily confinednto the direct and immediate consequences of his acts, and he may in many cases be held liable also for cansequences which resulted naturally and proximately, though not directly from his wrongful act. Damages awarded for such consequences are called consequential damages.

The liability of the wrong-doer, however, is not necessarily confined to the direct and immediate consequences of his acts, and he may in many cases be held liable also for consequences which result naturally and proximately, though not directly, from his wrongful act. Damages awarded for such consequences are consequential damages.

We have, then, in every case, a possibility for two kinds of losses. We always have, if there be a cause of action at all, the direct damages. But there may also be these remote consequences.

The rule governing the allowance in action for breach of contract differs from these prevailing in actions for tort and will be separately considered.

A. Damages in Contract. YThat a different rule applied in Contract from tort cases is now clearly recognized. But it is only during the last fifty years that this distinction between the tort and the damage case has been drawn. Since 1854 in England and about the same time in the United States the courts have drawn the line with sharpness and distinct. ness. You can see that there is a difference in the very nature of the circumstances which give rise to the cause of action. If A and B make a contract, and A complains that the contract has not been observed by B, there are these circumstances that appear on the face of the transaction: In the first place, that A selected B. It was the result of A's voluntary act. The parties come together voluntarily under the contract relations. In the tort case, on the other hand, this is by no means the case. I do not pick out a man to assault me. The person selects himself. I have nothing to do with it. But when I make a contract I have the power to select a man that suits me, a man of financial responsibility. In the contract case we came together to agree. Presumptively I have in my mind the things that I wish to accomplish, and he has determined what he wants. We are making an agreement. I contract to do a certain thing; he has in mind the consequences to him of the breach of contract. Having these consequences in mind, we can stipulate against a breach. We can make provisions to protect ourselves. But this is not the case in tort. The offender simply selects himself, there is a momentary impact and I am injured without any chance to protect myself. He is a bare, unmitigated wrong-doer. If, in the case of the contract, some unusual thing happens which the parties have not stipulated for

the defendant cannot be held as strictly liable as in the tort case. The parties have had time to stipulate, and if they have not seen fit to cover this point, then presumtively this point is one of no consequence. So in the contract case the liability of the party should be narrower. The law may say in many cases that if the party has not protected himself at any point, he presumptively thaught that point of no importance. But this is entirely different in the tort case. So in the tort case the defendant would be held liable for a much wider range of damages.

In actions for breach of contract it is the general rule that the party injured is entitled to recover compensation for all losses, which are either, first, the natural and usual consequences of its breach, or second, which can be said to have been fairly within the contemplation of the parties at the time they made the contract as the natural and probable consequences of its breach and which are neither uncertain in their nature nor remote as to their cause.

We have then these two conditions: 1. The consequences must be natural and usual. 2. They must be such that they can fairly be said to have been contemplated. "Usual" and "natural" are used here with reference to what ordinarily happens or what happens in the majority of cases; consequences that so commonly, so easily happen that we call them natural.

But there is some difficulty in the case of new and unusual contracts. Then nobody can tell what would be the result of the breach of the agreement. In the case of contracts of sale men have had so much experience that the actual consequences are well known to everybody. But in an unusual contract, as one for the sale of new machinery, nobody can tell about the result.

In such a case you have to appealto evidence to show what would have been the result if the contract had been an usual one. You have to put the uncommon contract on the footing of the usual and show what the results would have been. For this consequence the party who commits the breach is liable. The law will presume that he intended the result.

The defendant is liable for the natural and usual results and also for other results which can fairly be said to have been in the contemplation of te parties. Emphasis must be attached to the last phrase. It is not a result which can be said to have been in the contemplation of the parties by applying a technical rule, or by stretching a point. You need not show that

the result was actually in the contemplation of the parties. All that is required is that you show that the result must have been in their minds. It may be that in applying this rule you work great injustice. But you must remember that you are trying a case before a jury, and the court says that if the evidence shows the defendant must have had the result in mind, it is sufficient, even if he testify that it did not occur to him. If it is fair to presume that he did have the result in contemplation then the presumption is conclusive; the defendant cannot escape by shewing that he did not actually contemplate the result. It is a question of what can fairly be said to have been in the contemplation of the party.

If at the time of making the contract the result was not in the contemplation of the parties, then the defendant is not liable. To illustrate, take this case which has occurred several times in railroad injuries: A buys a ticket from Station B to Station C. It happens that on the train the conductor refuses to recognize the ticket. The party then for the first time says: If I do not get to this place at such a time, I will miss an engagement and I will hold you liable. But the plaintiff did not say this at the time of buying the ticket, and hence the company cannot be held liable. The company must have been informed when the ticket was sold. It is absolutely necessary to be able to say that the parties had the consequences in contemplation at the time the contract was made. It must be a consequence which can fairly be said to have been in the contemplation of the parties--not as a remote or probable consequence, or one that might happen under unusual circumstances.

The language of the rule I have laid down as far as it has been discussed this morning is that of the court in the case of Hadley v. Baxendale. This is the great case upon this subject not only in England, but also in the United States. The last qualification if the rule I have given was added by the court in the New York case of Griffin v. Culver.

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L E C T U R E IX.

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In actions for breach of contract it is the general rule that the party injured is entitled to recover compensation for all losses, which are either, I. The natural and usual consequences of the breach of the contract, or II. Such as may be fairly said to have in the contemplation of the parties at the time they made the contract as the probable consequences of its breach. Case of Hadley v. Baxendale.

The rule as laid down in 1854 in the above case was not entirely a new one, but it was in some measure a new statement of the rule. In some of the French codes this second feature had been stated in almost the same words. "Where there has been a breach of contract, the party injured must recover such damages as can reasonably be supposed to have been in the contemplation of the parties at the time of making the contract." So it was not entirely a new rule. The courts at the time were looking for a full statement of a rule to govern cases of breach of contract. Mr. Sedgwick incorporates the results of that case in his chapter on this subject. A vast amount of material had been collected from every source known on the subject, resulting in the crystallization of the doctrine.

The rule did not at once meet with universal approval as laid down in this case. There was some doubt as to its meaning. It was contended that there was in reality not two rules here but one, that the second was but a restatement of the first. It was simply an alternative method of stating the first case, for damages that were in the contemplation of the parties at the time of making the contract must necessarily, from the nature of the case, and from the limitation to human ability to look into the future, be such as were usual and ordinary consequences of the breach of such a contract. But it soon became evident that two rules were embodied in the opinion, and that has everywhere been accepted since. The two rules in this statement govern two entirely different classes of cases. The first rule is applicable to every case of contract. It does not matter whether the parties to the contract contemplated the consequence or not, the law assumes that they did contemplate the consequence, and no

inquiry is held into that phrase of the matter. That branch of the rule applies to every case. There are cases, however, where in addition to the natural and ordin ary damages for the breach contract further damages can be recovered, something like the additional exemplary damages. You can recover further damages if you can show that at the time the contract w as entered into the parties contemplated the consequences that would arise from a breach under unusual circumstances. These two classes are somewhat analogous to special and general damages, this first phase of the rule corresponding to the general and the second to the special damages.

Something of the nature of an exception to the rule has been made in the case of common carriers. The courts have held that it is not a practicable rule to apply in such cases, for carriers, being public corporations for the public service, cannot discriminate between its patrons. It has not entire froedom of contract. If I go to a private individual and ask him to make me a wagon, and say to him that if he has not completed the wagon by a certain time certain results will follow for which I will hold him responsible, and he agrees to make it in the time I want it, he assumes the risk, for he was free to refuse the contract under the circumstances. But with the public carrier it is different, because he is compelled to transport the goods. He does not stand free to refuse the risk. Therefore the courts have held that a less certain notice, a notice that would amount to a less express assumption of risk, would be sufficient in the case of an ordinary contract, but that it would not be sufficient in the case of a carrier. The plaintiff goes to the carrier and informs him that if this article is not shipped within a certain time such results will follow. The carrier cannot refuse the risk. So the courts say that so far as common carriers are concerned, there must be such recognition of the circumstances that you can say fairly that the goods were taken subject to the risk, for here the acceptance is not voluntary. But if the parties at the time the contract was made had the circumstances and consequences brought home to them, so that when the case is tried it can be said that the special consequences were in the contemplation of the parties, then the defendant, whether carrier or not, maybbe made liable for those unusual consequences.

Now in regard to the second qualification of the rule, that these consequences must be natural and neither uncertain nor remote in their cause. The plaintiff may give notice to the

defendant of a great many consequences which are simply contingent, speculative, and often where notice of this nature is given, the law does not hold the defendant responsible for consequences of that sort. It only holds him responsible for consequences that can be said to be reasonably certain.

These, then are the three elements of the rule: 1. Usual damages can be recovered. 2. Contemplated damages can be recovered. 3. The consequences must be reasonably certain. In a French case bearing upon this subject the court refused to allow the defendant to recover the amount of the profits upon a contract with the French Army which had been lost to the defendant by the delay of the carrier. The facts were these: The plaintiff had made a contract to supply the French army with a large number of shoes at an extraordinary price, but the high price was conditioned upon their delivery at a certain station at a particular time. He delivered the consignment to a carrier with the notice that they were for the French Army. The carrier made a delay for a few days; peace was concluded, and the shoes were no longer needed. They were thrown back upon the contractor. He brought action against the carrier and sought to recover the extraordinary profits which he would have made if the consignment had been delivered in time. The court, however, held that there could be no recovery for the unusual price. Although the defendant knew that the shoes were to be furnished to the army on a contract, he was not to believe that an extraordinary price was to be paid. While he was responsible for the ordinary price, he was not responsible for the unusual price that the contract called for. He was not held liable for the extraordinary damages.

The class that has given rise to the most difficulty is that where the damages are uncertain. Take this case for illustration: The plaintiff was building a mill and gave the contract for a flume. The party taking the contract agreed to have the flume completed within a certain time, but was delayed in its building. The plaintiff sought to recover damages for the loss of business that he supposed had resulted to him thru not having the flume. The question was whether a man could recover damages for the amount that he would have made if his mill had been ready. The court held the circumstances too conjectural in their nature to justify a claim for damages. The plaintiff could not be sure that he would have made anything, even if the mill had been ready. It might have been a losing investment. The matter

was too uncertain. The court held that there could be no recovery in a case of that nature. In a Kansas case, in which the contract involved the moving of a hotel from one town to anotehr over the prairie, the defendant was delayed in performing his agreement. The hotel was not moved within the specified time. The plaintiff sought to recover for breach of contract what he would have made in custom if he had had the hotel in the other place. He brought evidence to show what his profits would have been in the new location. The court here also held the circumstances too problematical. His profits were not assured. He might have made nothing at all, the custom depending upon the frequency of guests, the popularity of the landlord, the state of travel, and a variety of other uncertain causes. During trial he was asked what had been his damage from the non-fulfillment of the contract. The question was held objectionable, because no special facts could be given, the amount of the profits depending upon the defendant's opinion. Then, again, the prospective profits were too remote, too speculative, to be recovered. His past profits were not shown; how could he tell that his profits would be so much.

In the case of Masterson against the City of Brooklyn, there was a contract to erect certain public buildings. Before the completion of the buildings the city ran out of funds and stopped the work upon them. The plaintiff brought suit for the recovery for what he would have made if allowed to go on with the building. The court held here that he could recover profits because there were in this case elements showing what would have been his profits with reasonable certainty. The plaintiff showed the contracts for different parts of the work which he had made with others, and therefore could show with some definiteness what his loss would be. If the profits are reasonably certain they can be recovered.

The scope of the contemplated damages may be extended where the plaintiff at the time of making the contract gave to the defendant such notice of the special consequences of its breach that the defendant may fairly be said to have made the contract subject to such extended liability.

I think this rule would apply to the commoncarrier as well as to the individual. There must be at the time of the contract such notice of the special consequences that the defendant can fairly be said to have taken the contract subject to these special consequences.

There was a case in Maine in which the circumstances were as follows: The plaintiff delivered a sum of money to an express company to be transferred by it to an insurance company in a large city as payment of a premium on a life policy. The policy was one of the old kind where it was necessary to pay the money promptly on the date when the premium was due, under pain of forfeiting the entire policy. He informed the agent of the express company what the consequences of non-delivery would be. The company took the money with notice of that risk but delayed in the transmission of the sum and as a consequence the plaintiff forfeited his policy. The court held the defendant liable for the loss of the policy. It was established that if it was clear that the defendant knew the circumstances he would be made liable for the policy.

In a case in 117 Indiana there was a contract made for work to be performed upon certain materials to be furnished by the defendant. The defendant was informed that if the materials were not furnished the plaintiff's establishment would be compelled to remain idle. The defendant was given the distinct knowledge of that fact. He made delay in supplying the materials. The court held that the loss could be recovered from the defendant, as he could fairly be said to have made the contract subject to that risk.

Compensation may be given under these rules for gains prevented as well as for losses sustained, but in awarding damages for loss of profits allowance can be made for those only which can be said with reasonable certainty to have been lost with reference to the particular subject matter of the contract, but not for collateral or remote matters.

Profits which are speculative, contingent, or possible merely, can never be recovered.

While it is ordinarily true that profits cannot be recovered, it is simply because they are contingent and not certain. They can be recovered if they can be made to appear reasonably certain. The law does not intend to follow parties through all the devious roads of possibilities. It is only where damages can be shown with reasonably fair certainty that they can be recovered. Of this see the case of Masterson v. City of Brooklyn.

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L E C T U R E X.

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B. Damages in Tort. We have seen in the contract case that the defendant is liable always for direct and immediate consequential damages, and that in certain other cases he may be held liable in addition for consequences not the direct and ordinary result of the breach if it could be shown that at the time the parties made the contract they had such damages in contemplation. Now when we get into the tort field an entirely different rule of damages applies. We found there that there were reasons why the law would permit the plaintiff to follow the defendant to a greater extent and held him liable for a class of damages which it would not allow him to recover in a contract case. In the contract case it is proper that a more limited range be permitted because the parties have voluntarily entered into the relation. They had time and opportunity to stipulate against the possible but perhaps otherwise unexpected consequences, while in the tort case none of these circumstances are present. The parties here had never chosen each other and they never had an opportunity to stipulate and defend themselves against the possible and natural consequences of the wrongful act. Upon such reasons the law throws upon the wrongdoer the doubt, if there be a doubt, as to the naturalness and proximateness and ordinariness of the act complained of. In one case the doubt can be distributed. In the contract case you may say that the plaintiff is as much at fault as the defendant. He had opportunity to protect himself. If he has not protected himself he is as much at fault as the defendant. Both parties entered upon the arrangement voluntarily; but in the tort case the plaintiff is not at all at fault, and if there be uncertainty and doubt as to who shall bear the burden, the doubt shall be against the wrongdoer.

In tort the party injured is entitled to recover damages for all injuries which are the natural and proximate results of the wrongful act complained of.

Now of course in many states he may recover exemplary damages in addition if the act was wilful; but I will not dwell upon that. He is at least entitled to compensation. In all cases he is entitled to recovery for the natural and proximate results.

We might perhaps stop here and notice the distinction between the two kinds of result in the contract case. Here the party is entitled to recover for all injuries that are natural and ordinary. The injuries must result from a natural process. In the tort case a party is entitled for damages for all injuries which are the natural result of the wrongful act. They need not be usual or expected. But in tort as in damages the law never holds a party liable for consequences which have been brought about by unnatural means. If an act of God has intervened by some unforeseen or natural power, the party is not responsible. In the contract case the injuries must be usual and expected, so far as the first branch of the rule is concerned, and reasonable, under the second branch. In tort they need not be usual, they need not be ordinary, they need not be expected.

In actions of tort it is not necessary that the wrongdoer shall actually have contemplated the resulting injury as a probable result of his wrongful act. The law will presume that he did contemplate and intend all the consequences which naturally and proximately result from his action.

In dealing with the question of nominal and substantial damages, we had occasion to note the difference in legal contemplation between the cases where the act is a direct invasion of a right where it is wrong in itself, and where it is wrong only by reason of its consequences. This is seen in the distinction between the case of negligence and the case of trespass. A trespass is always a wrongful act and injury always results. But negligence is wrongful only in case some one is injured. In this case there is no wrong without actual injury. Negligence is always relative. In one case he commits a direct act of invasion upon the plaintiff's right's of property, and in the other a relative, indirect act, by virtue of some ommission. In the first class, where the act is itself wrongful, the law holds that the wrongdoer contemplated and intended whatever results, natural and proximate, came from that wrongful act. It makes no difference as to whether he could or did contemplate the natural result. Take as illustration a case of assault. This is a wrongful act in itself. The natural and proximate result may be entirely unforeseen. Still the law holds the man responsible, even though he did not foresee or intend that particular result. He has committed a wrongful act and he must take the consequences. In the contract case this is not true.

The parties can be only responsible for the ordinary result and for what they have actually contemplated. In the tort case the intention is of no importance. If the defendant is guilty of the wrongful act he is liable, even though he did not and could not know the particular that did insue.

In the tortfield, then, we have these two branches: 1. Where the act is wrongful in itself, 2. Where the act is wrongful only by reason of some injury. The law only holds a man guilty of negligence where he fails to take that care which a reasonably prudent man would have taken. He cannot be held guilty of negligence unless under the circumstances a reasonably prudent could have foreseen some rosult. If he ought to have foreseen that some injury would result, then his act is wrongful, and being wrongful he is responsible for whatever result did follow, though he did not see the result.

In determining whether an act is wrongful a distinction must be made between cases of trespass, or wilful and wanton injury, and cases of negligence. In the former cases the act is wrongful in itself, and the law presumes injury and in t e case of alleged negligence it is necessary that a reasonably prudent man could have foreseen that some injury at least would result from the act.

Injuries cannot be considered too remote which ought to have been apprehended according to the usual experience of mankind and where some injuries ought to have been apprehended, it is not necessary that the injury in the precise form in which in fact id did result should or could have been foreseen. It is sufficient that it subsequently appears to have been the natural and proximate consequence.

Enough has been said, perhaps, to make it clear that in determining whether a particular result is natural and usual or natural and proximate, whether it is such a result that the party shall be held responsible for it in contract or in tort, the law looks at the matter from two entirely different standpoints. In t e contract case the law attempts to put itself in the situation in which the parties were atthe time of making the contract, and then from that standpoint tonlook forward to see what shallibe expected as the usual consequence of the breach of this contract; or, if unusual circumstances are brought home to the parties, what the natural and probable consequences under even those circumstances would be. The law stands at the time at which the contract was made and looks forward to find the natural, expected, and ordinary result. In the tort case

the point of view is entirely shifted. The parties never had the opportunity to look forward to the result. The only time is after the happening of the consequence, after the wrong has been inflicted. Then only can causes and results be traced. The law therefore allows the parties to look forward from the injury. In the other case the law stands at the time of making the contract and looks forward. In the tort case the law stands at the time of the injury and looks backward. The only question in the tort case when we know the fact is to tell whether or not our force, our wrongful act has operated by some natural process, and whether the following consequence is not too remote. The law in this class of cases holds the individual responsible for whatever, standing here and looking backward, may be said to be a natural and proximate result of the act. It does not matter, if, standing at the other end, before the wrongful act, we could not have foreseen the result. The difficulty in this class of cases is to find whether the result is proximate. The law does not hold a man responsible for every conceivable result. There was a case in Vermont where it appeared that the defendant had left the bars of the gate to his field down, and the plaintiff's sheep had wandered into the defendants woods and had been there destroyed by wolves. The wolves were unusual in that part of the country. The plaintiff tried to recover the value of the sheep, holding that if the field had not been left open the sheep would not have wandered into the woods and been devoured. The court awarded damages, although some courts dissented. One judge suggested that the wolves could have been driven into the woods by the wrongful act of some hunter , in which case the hunter would be liable. But what brought the hunter there? The hunter would not have been there if the colony had never been founded, or if the Pilgrims had not come to New England. You could trace it back and say that Columbus, through the discovery of America, was indirectly responsible for the loss of those sheep; you could go still further and say that Noah, and finally Adam was the responsible party. The law has to draw some absolute line. The line it does draw is the line of proximate cause. The defendant is responsible for the natural and proximate result. The difficulty comes in the application of this apparently simple rule. What appe ars to one man as a natural and proximate result will not appear so to another.

The law in these cases looks to the proximate and not to the remote cause of the resulting injury. The proximate kause is that

which directly produces the injury, without the intervention of any other independent cause for which the wrongdoer is not responsible, and without which the injury could not have happened. It is that which is a natural and continous consequence, unbroken by any now cause, produces the injury, and without which the injury would not have occurred.

No one has succeeded in giving an accurate and satisfactory definition of proximate cause, the courts have generally agreed upon certain features of description. That is a proximate cause which by some continuous chain of events, when a continuous consequence, unbroken by any new and independent cause, brings about the result, and without which the result would not have happened.

A wrongful act which exposes one to injury from the elements, or the natural tendencies of animals, or the instinctive action of human beings, or any natural cause, under circumstances which rendered it probable that such an injury would occur, is a proximate cause if the injury does occur.

Things rarely happen unconnected with other determining circumstances. Other circumstances are constantly adding to and contributing to the effect of any act in some way. If a party commits an act which he knows will bring into play other natural forces, he is responsible for the injuries that result from those forces. For example, if a man lets water run at a time and under circumstances where he knows it will freeze, making a slippery place on the walk, he cannot escape responsibility by saying that he did not know it would bring about such a result. If his act was the primal cause, even though a natural cause intervened, then his act is the proximate cause. If a man does something under circumstances which would naturally lead to the frightening of a horse, he cannot escape liability by pleading his ignorance of the result.

The question of what is the approximate cause is ordinarily a question of fact for the jury, under proper instructions from the court; but where the facts are undisputed, it may be decided by the court as a question of law.

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L E C T U R E XI.

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VII. Liquidated and Unliquidated Damages. Damages are liquidated when the amount thereof has been ascertained and determined, Until that time they are unliquidated.

In damages where the suit to recoverhas been sustained, until you have ascertained and determined the amount the question of amount is necessarily uncertain and unfixed; the damages are then said to be liquidated. The damages being a sum of money to be paid for an injury, the question becomes materila at once to determine how much shall be paidand until that question is settled the damages are said to be unliquidated. When the amount has been ascertained in any way, when he can say "here is a specific amount to be paid," then and then only, do the damages become liquidated.

They may be liquidated in one of two ways; first, by act of law, second, by act of parties. They may be liquidated at one of two times, first, before the injury, second, after the injury.

You readily see that in some cases the amount can be determined by the parties, and then the damages are said to have been liquidated by the parties. In the majority of cases the law liquidates the damages, then they are said to be liquidated by law. In some cases the damages may be liquidated before the injury. It is possible to have liquidation in one of these two methods and at any one of these two times.

Damages are liquidated by act of law before the injury where the law declares in advance what the damages to be recovered in any certain event shall be; as in the case of penalties.

There may be cases where the statute may declare prospectively that if an injury shall be committed a penalty shall be attached and certain damages shall be recovered. Such cases are not very frequent. It usually takes the form of the imposition of a penalty.

They are liquidated by act of law after the injury where they have been ascertained and determined by some established tribunal as in the case of a judgment or award.

This we shall find to be the ordinary method of liquidating damages. The usual method is for the parties to wait until after the injury has been done and then submit to some tribunal or some specially established board of arbitrators. If the amount is

fixed by a court, it is called a judgment; if by some special tribunal, an award.

Damages are liquidated by act of parties before the injury where the parties by valid contract have determined what the damages for a future possible breach shall be. They are liquidated by act of parties after the injury where the parties have by valid contract agreed upon the amount of damages for a past injury. Eadh of these methods is a valid one and the result arrived at will be conclusive. The only one which requires special consideration is that of liquidated damages by act of parties before the injury.

I do not doubt that you have already come in contact with some phases of the question of te right of parties to liquidate their damages by contract. This is a very difficult part of the subject. It is hard to fix the damages for a possible future breach. The question specifically would be this: whether or not the parties before the breach of contract has arisen may agree what the party who breaks the contract in the future shall pay to theother. At first we might say that there could be no legal objection to the parties' agreeing what shall be paid in case of breach. We sometimes say that the damages shall be enforced which the parties themselves agreed upon. Now that is true, but not necessarily conclusive in this field. Take this extreme case. I agree to pay a party upon a certain date the sum of $100 and I stipulate that if I do not pay the $100 as agreed I shall forfeit $1,000. Would it be reasonable for the law to compel me to pay the $L,000? I have agreed in positive terms to do so. Very clearly it would not be the policy of the law to enforce such a contract as that. The only damages that he can recover for not receiving the $100 is the legal interest. Here would be a case where the parties agreed to do a thing contrary to the policy of the law. Now the whole theory of damages is to compensate the plaintiff for injuries. Full compensation and no more. So far as the payment of money is concerned if we could enforce stipulations of this sort we could evade the laws against usury, which isnagainst the policy of modern nations. It would lead to extortion. Running all through the law of damages is this notion that the law will not enforce oppressive or extorticnate contracts. It is the old case of Shylock and the pound of flesh. The lawstill insists upon the same principle as in the famous case in which Portia sat upon the bench.

On the other hand, there are cases where the law will enforce agreements of parties. There are cases where the parties are in

better position to agree upon the amount of damages than the law can be, assuming that the law prefers its own methods in the ordinary case. There maybbe cases where the nature of the contract is such and the circumstances surrounding the parties of so peculiar a character that they can rell better what the damages shall be than the law. Where circumstances of that kind exist, the law permits the parties to stipulate what the damages shall be. But it is onlybin cases of th at genebal nature, where it is presumed that the methods of the parties are preferable to those of the law that the law will allow the parties to follow their own methods. The legal presumption must always be that the law's methods after the injury are better than the parties' methods before the injury.

The law recognizes the right of the parties in many cases to fix by their agreement the damages to be paid in cases of a future breach of their contract. Such damages so agreed upon are called liquidated, agreed, or stipulated damages.

I think perhaps the term liquidated damages is the one most commonly used. Mr. Southerland, in his book, uses the word stipulated damages.

The parties cannot, however, in all cases, so liquidate their damages, and not every sum which they declare shall be paid in case of breach will be deemed in law to be liquidatod damages. The sum so named by the parties may, according to the circumstances be held in law to be a real liquidation or it may be regarded as a mere threatened forfeiture or penalty.

Now the two things which the law opposes to each other in this connection, are, on the one hand, liquidated, ascertained, stipulated damages, and on the other, what is called a penalty. The main difficulty about the matter here is to understand what the law means by a penalty. Perhaps it does not seem to be a very apt term but there does not seem to be another to take its place. In the ordinary case the penalty relates to a fixed sum to be paid for a wrong. But in this connection it relates to something entirely different. Suppose I borrow $1,000 of some person. I deposit with him as a bond property worth $10,000. I have now put up this $10,000 by way of pledge and the general understanding is that if I do not pay the $1,000 I shall forfeit the $10,000. But, as you know, that is not true in law. The law ordinarily does not permit parties to make contracts for mere forfeiture. All the party can do is to sell the property, satisfy the debt, and return the rest to me. It is merely the security for the payment of some other sum. In the case where I promise to pay $1,000 onthe failure to pay the $100, the $1,000 is regarded as penalty and not as liquidated damages.

The law regards this as a mere threat, that if I do not pay the $100 I shall be compelled to pay the $1,000. It is a mere threat, a club held over the individual ro scare him into the performance of the agreement. It does not mean that I shall actually forfeit the $1,000. If it were liquidated damages, I would be compelled to pay the $1,000. If it is liquidated damages it is an amount which has been agreed upon by me. If itis not liquidated but a mere threat or penalty it has no more effect than a mere threat. I may agree that this $1,000 is to be regarded as liquidated damages and not a penalty, but this will not prevent the law brushing aside the contract and compelling the defendant to pay only lawful interest. If it is liquidated damages, the party must pay the precise sum named. The law ignores the amount named in the contract and goes to work to find the real injury and awards the real amount of the loss.

You may see how other results would come about through this distinction. There may be a case where the parties have stipulated their damages, where it is a real stipulation. It may happen that the actual loss incurred is greater than the amount agreed upon. But no more can be recovered. Theybmay have stipulated for a sum greater than the actual loss, but the same sum is recovered. If it be stipulated damages, the party recovers that whether more or less. If it be penalty, the party recovers actual damages whether it be more or less.

If it is a liquidation, then the amount so fixed may be recovered whether it is more or less than the actual damages. if it is a penalty, then the actual damages are to be recovered, whether more or less than the penalty named.

The rule is clear; the difficulty comes in determining whether the sum named is really stipulated damages or penalty. This sometimes is a very difficult question to determine. Somewhat different opinions are arrived at by the different courts. You can readily see how one court looking at the contract may say that it is liquidation and another court in passing upon the same contract may say it is a penalty. You can readily see that the law in doubtful cases will prefer to make it a penalty. By doing this the court is left free to find the actual damages and compensate for them. It is always in accord with the policy of the law in doubtful cases to make the sum a penalty rather than a liquidation. The defendant willnnaturally insist that it is a mere penalty; the plaintiff that it is a liquidated damages; it is the interest of the parties.

In determining whether a sum named in the contract is liquidated damages or mere penalty, the courts look, not to the mere words used, but to the whole contract, the situation of the parties, the purpose in view, and the equity of the case. In aid of this determination the following rules are applied:

1. What the parties have called the sum named is not conclusive.

For example, the books are full of cases where the parties have attempted to use language to settle the controversy without question, as in a case in the book where a party promised to pay a certain sum which was declared to be stipulated damages and not a penalty. They attempted to make it absolutely clear. The court simply ignored their stipulation and said that the whole contract taken together pointed to the fact that the sum was a penalty and not stipulated damages. It would be very strange if by the use of phraseology parties could evade a rule so well established as this one.

2. Where the construction is doubtful the courts prefer to construe it as a penalty rather than a liquidated damages.

3. Where a large sum is named as damages for the non- payment of a smaller sum of money, it will be a mere penalty. That is an invariable rule.

4. Where the actual damages are certain or easily ascertainable, a larger sum named will be deemed a mere penalty.

5. Where one sum is named as the damages for the non-performance of any one of a number of agreements of different importance, the sum will be deemed a penalty.

6. Where the actual damages will be uncertain and not readily ascertainable and the amount named appears to be based upon the principle of compensation and is not unreasonable or unconscionable, it will be deemed liquidated damages, if that appears to have been the intention of the parties.

That is the real essence of the whole matter.

55 N.J.L. 132	39 Am. St. Rep. 626.
148 Pa. 645, 33 Am. St. Rep. 846.	19 L.R.A. 456.
82 Me. 516	21 Ore. 194.
127 N.Y. 480	47 Kan. 126.
91 Tenn. 154.	127 Pa. 289.

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L E C T U R E XII.

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We come to-day to the case of what is called the penal bond. These stand upon somewhat a peculiar footing, both as regards form, legal consequences, and legal history. It is necessary to keep in mind the distinction between the covenant with penalty and the legal bond.

A distinction must be made between the covenant or agreement secured by a penalty and a penal bond strictly so called. The penal bond is an instrument imposing a penalty and conditioned to be void upon the payment of a certain sum or on the performance of a specified act and without any express agreement that the sum will be paid or the act performed.

The penal bond is an instrument composod of twoparts; one is the part imposing the penalty; this followed by the specification of the condition. For example, a money bond would readin this way: "Know all men by these presents that I, John Smith, am firmly bound to Peter Jones in the sum of $10,000 in the lawful money of the United States, for which sum I bind myself, heirs, and assigns. Signed by me and dated this day of _____." There is no condition or qualification upon it so far. Then comes the seal and signature. Then following that express language of liability is language to this effect: "The condition of this obligation is such that if John Smith shall cause to be paid to Peter Jones the sum of $5,000 on the_____ day of _____, this obligation shall be void." At the beginning there is an express acknowledgement of the liability. It is followed by the statement that liability shall be void in case the party does a certain thing. You will notice that there is no promise to pay in the second part. "The condition of this obligation is such that it shall be void if John Smith shall cause to be paid to Peter Jones a certain sum." The character of the penal bond is that it recites an obligation with the statement of the condition upon which the obligation does not need to be performed. There is no express agreement that the act shall be performed. Under the old common law in actions for recovery under these bonds the court ignored entirely the conditioning clause. If the condition named in the bond was not complied with, the party holding the bond might have action for the entire penalty named in the bond. The hardship of this result made the equity courts allow the party to come in and be relieved by paying the sum

named in the penalty and the costs. After some years the courts of law began to follow the same rule, and later the parliament took the matter up and declared that the rule first followed by the court of chancery should be the rule in all cases. In the time of Queen Ann it was provided that if the person bound made default, he might come in and pay the amount due with costs and be free from the penalty. The same evolution took place as regards promises to perform some act. First equity interfered and then law and finally statute. We have statutes in this state, and they exist in nearly all the states, to the effect that if action be brought upon the bond, the party suing must assign breaches; he must sue, not for the penalty, but for the acts of omission of which he complains, and then he is to recover damages for the breach and not the penalty. So in the states, by virtue of the statute, the sum to be recovered is damages for the non-performance of the act and not the penalty itself.

If we were to stop right here, you would say that there is no difference between the penal bond and the covenant with penalty. If there be a covenant or agreement to do a certain act and to secure the performance of that act the penalty is attached, then in case of breach the plaintiff may recover actual damages whether more or less than the penal sum. In the case of the penal bond damages are assessed and paid, but they cannot be paid in excess of the penal sum. Herein lies the difference. In drawing a mortgage for the sum of $1,000 you make the obligation in the penal bond $2,000. Then the condition is that if the party shall pay the sum specified, $1,000, the obligation shall be void. The purpose of fixing the sum at $2,000 is to give the plaintiff some leeway, for the plaintiff can recover nothing more than the amount named in the obligation. So it very common to fix the penalty very much in excess of the sum named in the condition. The parties must be sure to specify some sum large enough to meet all contingencies.

If there be a covenant or agreement and there be attached to that covenant or agreement a penalty, if it be penalty as such, you may recover for the breach of the covenant or agreement whatever damages may be sustained. But in the penal bond where there is no express covenant or agreement, where the only acknowledgement is that you owe the peral sum, you can recover no more than the penal sum named, even though the damages may be more than the sum specified in the penalty. I think everywhere now where the penal bond is recognized these are the rules. In very many cases the parties expressly expect to be limited by the amount. A man gives surety for a public office. The penalty there limits the extent of his liability.

The statute in this state and in nearly all the states provides that on a penal bond actual damages alone can be recovered and only up to the amount of the obligation. But the statute also provides that the judgment may stand as security for further breaches. For example, if the penal bond provides for the doing of successive acts or the payment of successive sums, the judgment stands for the further performance as the acts become due. The law still in form permits the party to recover the penal sum, but satisfies it by the payment of mere damages.

In an action upon the covenant or agreement secured by the penalty, the actual damagesare to be recovered whether more or less than the penalty named; but in the action upon the penal bond the measure of damages is compensation for the actual injury sustained and not exceeding the penalty.

The Pennsylvania case in the book illustrates the difference between these two forms of agreement. The parties had entered into a contract for the sale of stocks, and their agreement was in this form: the personbound made a written instrument in which he stated he had undertaken to buy of the other party certain stocks specified and to pay for the same a certain sum. Here was a recognition of his agreement to buy. Following was a penal clause to the effect that if he should not buy he should forfeit the sum of 1,000 l. Now it happened that the stocks greatly depreciated in value so that the actual loss was 1700 l. The question was whether the 1700 l. should be recovered or only the 1,000 l. The defendant held that it was a penal bond, and the plaintiff that it was an agreement with penalty. The court decided that where there is a covenant upon which you can sue independently of the condition, then you can recover actual damages. But in the case of the penal bond where the only agreement is to pay the penalty, no more than the penalty can be recovered.

If the damages equal or exceed the penalty, then by the weight of authority in the United States, interest on the penalty may also be recovered from the time the damages became due.

A bond is drawn up with the penalty at $5,000, the condition is $4,000. The condition is not fulfilled and the interest accumulates untilthe sum named in the condition plus the interest amounts to $6,000. This situation presents itself quite frequently. Under the rule you can recover only $5,000 even though there is $6,000 due. You cannot recover on the penal bond more than the penalty named. In some of the states, in order to obviate the hardship of this rule the courts have held that where the damages exceed the penalty and are not paid, then you can recover interest upon this sum from the time it is due, upon the theory that since the conditional sum has not been paid the penalty has

has become due. The English courts repudiate this rule. The courts in Michigan also do not recognize it. In New York and the majority of states the courts have permitted the party to get interest on the penal sum from the time the sum has become due by way of additional damages for the non-payment.

Alternative Agreements. Besides the cases of liquidated damages and penalty and penal bonds there is a third case. That is, where a party agrees to do either of two things. I agree to deliver on a certain day either a horse or 100 bushels of wheat. I have the option of doing either. I may say that if I do not deliver the horse I will pay $100. Ordinarily the agreement is to do one of two things, neither of them the payment of money. Suppose I do neither. Which optional part of the contract is the one to enforce? Who shall ascertain what the damages to be recovered are. Shall the plaintiff recover for the non-delivery of the horse or for the non-delivery of the wheat. The wheat may be worth $150 and the horse $100; if the plaintiff sues for the horse he gets $100, if for the wheat $150. Who shall determine for which branch the defendant is to be held liable? The law proceeds upon the supposition that if the defendant has agreed to do one of two things he will do that which is most favorable to him, and if there is a breach it will be of that thing which is least favorable to him. Consequently, if the plaintiff recovers, he must recover for the breach least favorable to himself and most favorable to the defendant, on the ground that the defendant would have picked out the condition most agreeable to him.

Where there is an agreement to do one of two things, at the option of the promissor, the damages for the breach are limited to compensation for the alternative least beneficial to the plaintiff. If, however, the agreement is to do a certain thing or to pay a sum of money, then the sum of money named may be either liquidated damages or penalty in accordance with the rules already given.

If my agreement is to do a certain thing or to pay a certain sum, the sum may be damages or penalty in accordance with the rules I have given you.

There is still a third form of contract that does not strictly fall under any of the classes what we have been considering. That is to pay a certain sum in property. There, usually, if the sum is not paid in property at the specified time, the courts assume it to be an absolute promise to pay money and consider it as such.

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L E C T U R E XIII.

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VIII. Damages for the non-payment of money. The question of the damages for the non-payment of money may arise in one of two classes of cases: 1. Where money is due by reason of an express or implied promise to pay it, and 2. Where the money is due as compensation for the commission of a tort.

There are two classes of cases in which money will become due: one the contract, the other the tort case. The contract case is where there is an agreement expressed or implied to pay money which has not been carried out; the tort case is where a sum of money has been ascertained to be due as compensation for the commission of a tort and this sum has not been paid.

The Contract Case. The measure of damages for the non-payment of money according to contract is the sum of money so agreed to be paid together with interest thereon, at the agreed rate, if there be any, of if there be no agreement as to the rate, then at the legal rate from the time of payment so due until the date of judgment.

A promise is made to pay a certain sum of money at a specified time; the payment is not made and action is brought. The purpose of the action is not specifically to get the precise sum agreed to be paid in the ordinary case. Ordinarily the action is not for getting the payment of the sum itself but damages for the non-payment of the sum. The damages for the non-payment of money include the sum agreed to be paid with interest at the legal rate, if there was no agreed rate, from the time the moneybecomes due until the matter has been reduced to judgment.

The judgment itself then draws interest, usually at the legal rate, sometimes by special statute at the rate stipulated in the contract upon which the judgment was based.

If there be no stipulation as to the rate, the judgment will bear interest at the legal rate. But in many of the states, in this state, Mississippi, Arkansas, special statutes exist, declaring that if the judgment has been obtained upon a contract which itself provides a rate of interest, the interest upon the judgment shall be at that rate. The legal rate in this state is 6%, but if the contract contains a rate of 8%, the interest upon the judgment will be at that rate.

For the mere non-payment of money to a person in accordance with the agreement to pay it to him the law deems the sum with interest full compensation, and it cannot be

increased by showing that the non-payment caused great or special or unusual injury to the person to whom the payment was due.

Where the promise is simply to pay money, not to use the money for the accomplishmeant of some collateral object or to pay the money to a thirs person the law deems the sum to be paid with legal interest or agreed interest full compensation. Contrary to the usual rule ycu cannot increase the damages by showing that the non- peyment caused special injury. Suppose I said to A when I loaned the money that I must have the money at a certain date to meet certain obligations or become bankrupt. Applying the rule of Hadley v. Baxendale we would say that the person made this contract under these circumstances and that the unusual damages should be recovered. But this is an exception. The law deems interest in addition to the sum full and complete compensation for all possible damages. If A cannot pay and forces me into bankrupcy and great loss I cannot recover more compensation. It was a rule early established in the English law that the sum with legal interest was full compensation. Under no circumstances, by reason of unusual or special consequences even though the party had the circumstances in contemplation when he made the contract, can he be liable for any more; it makes no difference how directly the suffering follows from the non-payment.

Contrast this with the case where the person agrees to pay money to another to accomplish some ulterior purpose, as, for instance, if I should promise A to pay a certain sum of money for his taxes or to remove an encumbrance on his property. Here the promise is not to pay the money to A, but to a third person for A's benefit. In this case the ordinary rule of Hadley v. Baxendale holds. If I promise to A to pay his taxes and then fail to do so and the property is lost, I am liable for the full value of the property. If I say to A: "I will pay you $100 and you can take that and pay the taxes on your property yourself," then if I fail to perform my agreement he can recover only the 4100 with interest. The distinction lies between the case where I promise to pay money directly to a second person and the case where I promise to pay money to a certain other person for the accomplishment of some collateral object. The law considers one a bare promise to pay and the other a promise to pay to a third person a sum for the accomplishment of some other purpose. In the second instance the rule of Hadley v. Baxendale holds. I am liable for the full damages that result from the non-payment.

But where the promise is to pay money to a third person for the purpose of accomplishing a particular lawful object, as, for example, to pay taxes, to remove encumbrances, to honor checks, and the like, the party injured is not limited to interest but may recover according to the actual injury.

The case of money deposited in a bank to be drawn upon by check is a good illustration. The contract between me and the bank at the time I deposit the money is that my shecks shall be honored. If I give checks to third persons the bank is under obligations to cash those checks. If the bank fails to do so and I am arrested for non-payment of debts or for obtaining goods on false pretenses by pretending to have moneybin the bank when my checks are not honored there I can recover damages from the bamk for the actual injury. A case of this kind came up recently in Minnesota. A depositor gave a check to a third person for the payment of a debt. Owing to the mistake of the cashier the check was not honored and the depositor was arrested for the non-payment of the debt. The bank holds that the only damages that could be recovered was the interest. The court held that the bank was not limited to interest but that the whole injury must be compensated for.

Interest may be recovered on money unpaid, either by virtue of an agreement to pay interest or by virtue of the rules of law. In the former case it is interest by contract. In the l atter case it is interest as damages.

I want to make clear here the distinction between interest by way of contract, and interest by way of damages. With interest by way of contract we have nothing to do in this course. Suppose we have a note of this kind:

Ann Arbor, Mich., Jan. 1, 1898.

One year after date I promise to pay A the sum of $100.

"B."

If the sum is not paid on the first of January, 1899,A has sustained an injury in not receiving the payment. The law in this case will give interest strictly by way of damages because B has not paid the $100. He cannot have the interest a s damages until B is in default. During the year the sum is not due and the damages will not be due. Interest as damages will run only from Jan. 1, 1899.

But suppose I have a note of this kind:

Ann Arbor, Mich., Jan. 1, 1898.

One year after dato I promise to pay A the sum of $100 with interest a t 6%.

"B."

Now I will draw interest from the date of the note. Interest

by way od damages will run from the date of default. When Jan. 1, 1899, comes around B owes A $106. If he makes default, thelaw will compute interest as damages on the $106. The only question is whether the contract rate will run after maturity as before.

If the contract bears interest by its terms all the interest that is payable by virtue of the contract is interest by way of contract. If the contract bears no rate of interest, then damages will be computed at the legal rate.

Whenever money is due and not paid the law will give interest as damages from the date that the payment was due at the legal rate. If there is to be interest before maturity, it must be interest upon the contract.

Interest by way of contract may be recovered upon money for the period before it becomes due. Interest as damages can be recovered only from the time the money became due and was not paid. Interest by way of contract may be recovered at whatever rate the parties have fixed, if it be a rate permitted by law. Interest by way od damages can be recovered only at the legal rate.

Suppose we have a contract calling for interest at 8%. In this state the legal rate is 6%, and this is the rate at which interest will be computed if there is no stipulated rate in the contract. 8% being within the limit prescribed by st atute, interest will be computed on this contract at this rate. In some states there is no limit to the rate which the parties may fix. Interest by way of contract may be recovered anywhere within the range which the law allows, but interest by way of damages can be recovered only at the legal rate.

By the weight of authority where the contract fixes the rate of interest before maturity, the same rate continues after maturity until payment, though some cases allow simply the legal rate after maturity where the legal rate is less than the agreed rate.

This latter was at one time the case in Indiana. If a contract called for interest at 8% and the legal rate was 6%, interest at the contr act rate would be recovered only for the time before maturity, after that, at the legal rate, 6%. But in the majority of states where the contract stipulates the interest before maturity, the same rate continues after maturity.

The only question that arises is whether the stipulated interest is by way of contract or damages. If the contract contains the words "until paid," the rate covers the entire period. Most courts will presume that these words are implied in the contract. There have been cases, however, where courts have held that after maturity interest could be computed only at the legal rate.

Interest as damages is estimated at the rate prevailing at the time default is made, and, according to the weight of authority at the rate of the place of payment.

There is some difference in regard to this last, some authorities holding that the rate of the place where the contract is made, and not the place of payment, should be the rate.

Interest as damages cannot be recovered upon demands which are wholly unliquidated and uncertain.

The reason for this is obvious. If I am charged with interest for the non-payment of money, I certainly ought not be liable unless I know the sum. I certainly cannot be held to be in default for the payment of some uncertain sum, and until I have made default I am not liable for interest as damages.

A claim will be deemed liquidated for the purpose of interest whenever it is either certain or capable of being made certain by computation merely, or by reference to market or other ascertainable values.

A sum is certain which is either certain itself or capable of being made certain by reference to some standard.

Whenever a demand so liquidated is not paid when it becomes due, interest by way of damages may be recovered upon it from the time it so becomes due until the date of the judgment.

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L E C T U R E XIV.

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Contracts for the payment of money where no time limit is specified.

Where no time is specified for the payment of money, or where it is expressly payable on damand or where it came rightfully into the defendant's hands, and is not detained in violation of any duty or agreement to pay it over, interest as damages cannot be recovered until after the demand for payment and a refusal or neglect to comply.

There are three branches of this proposition that require dome attention. 1. If there be no time specified for the payment of money. If I have money in my hands belonging to somebody else and there is no time specified for paying, I am not in default fornot paying until the money is demanded. The law presumes that payment is due upon demand. There can be no default until the money is demanded and there has been a refusal or neglect to comply. 2. Where the money is expressly payable on demand. In this case demand must be made before interest as damages can be recovered. 3. Where money came rightfully into the defendant's hands and there is no charge upon him to pay it over, as where a person is asked to keep money subject to further instructions. No interest as damagos can be recovered in this case.

But if the money was obtained wrongfully or by extortion or by traud, nodemand is necessary, and interest as damages may be recovered from the time it was so obtained. If the money was rightfully obtained and wrongfully detained no demand is necessary.

An example of the latter case would be where an agent is authorized to collect money with instructions as soon as he collects to turn the money over. He obtains the money and fails to remit. The money was rightfully obtained but wrongfully detained. Damages can be obtained from the time the money ought to have been paid.

2. In Tort. You readily see a difference between these cases with which we have been dealing and the tort case. In the tort case there is no agreement, in the contract there is. In the contract case the sum is liquidated; in the tort case the sum awaits liquidation. In the contract case the amount is either certain or readily ascertainable; in the tort case the

money comes as compensation for the commission of some tort, and in very many cases from the nature of the circumstances you cannot tell how much is due. In the case of assault and battery the plaintiff is entitled to compensation, but the amount to be paid is uncertain, and interest by way of damages cannot be assessed until the sum is known. Until the award is made the defendant does not know with how much he is chargeable, and he is not in default for not paying the sum until it is ascertained. There can be no interest on damages until the sum has been ascertained by judgment. On claims of this sort, then, interest must be recovered from the date of the judgment.

Interest upon claims for the commission of torts is not usually recoverable until the claim has been liquidated by reduction to judgment. This seems to be the rule in all cases of personal injury, such as assault and battery, slander, lubel, flase imprisonment, neglect, injury, and the like.

It is not possible to lay down any very definite rule here owing to the varying courses taken by the different courts. In reading the older cases you will find a great deal indicating that the jury was vested with a great deal of leeway in determining whether they would give interest. In modern cases the rule seems to be not to give interest as damages until the amount has been liquidated by being reduced to judgment. In the earlier cases the jury seems to have been vested with a good deal of discretion asnto how they would act in this matter.

There is an exception to this rule--the case of property having a fixed and readily ascertainable value. Suppose I ship goods by rail and they are destroyed by negligence of the railroad company. When they are lost I can show the real amount of damages from the current market prices or other standards. There is no reason why interest should not be recovered from the date of the loss. In the assault and battery case there is no standard of inquiry that can be applied. It depends entirely upon the varying views of men, and until the properly established tribunal has determined the amount of the loss, there is nothing upon which interest can be computed.

Where property having a definite or readily ascertainable value is wrongfully raken, detained, injured, or destroyed, the prevailing rule is that interest and damages may be recovered on the loss from the time of the wrongful act. But if the damages in tort are uncertain and not readily ascertainable, interest as damages cannot be recovered until the amount of the loss has been liquidated by judgment.

We now enter upon a new field of our study, the application of these rules to specific cases. All these cases are covered by the principles already discovered and I shall now take up their application to some of the familiar transactions.

IX. Damages for Breach Of Contracts concerning Personal Property.

Most ofnthe contracts in this field are contracts to sell or supply goods on the one hand, and contracts to buy or take goods on the other. Contracts to loan, keep, hire goods are exceedingly common forms of contracts that need to be dealt with.

a. Breach of Agreements to Sell Goods. The specific case would be this: Suppose A agrees with B that at a certain time he will supply him with the specified goods for a certain specified price. What will be the measure of damages in case of a breach of this contract?

The measure of damages for the breach of a contract to sell or supply goods where the goods have not been paid for in advance is ordinarily the difference between the market price and the contract price of the goods at the time and place of delivery, with legal interest upon such difference from the time of default until the date of judgment. Where no time of delivery is expressly agreed upon, a reasonable time is implied. If there be no market at the place of delivery, then the price of the goods in the nearest and most available market with the cost of transportation added furnishes the basis for the damages.

What will be the measure of the damages if the goods have no market price at all, as in the case of family heir-looms, old pictures, certain articles that have no value aside from their associations.

If the goods be such as have no market value or are not to be procured in any market, then the measure of damages must be based upon the reasonable value of the goods under such circumstances as the parties can fairly be said to have contemplated.

Suppose now the agreement is to deliver the goods at town A, but the defendant delivers them at town B, or suppose the agreement is to deliver the goods at time A but the defendant delivers them at time B.

If the default be that the goods though delivered are not delivered at the time or place agreed upon, then the measure of damages must ordinarily be the difference between their value at the time or place agreed upon, and their value at the time or place of actual delivery, together with the loss of use of the goods during the delay. If the default be in not delivering all of the goods agreed upon the measure of damage is the difference between the value of the whole and the value of the part delivered.

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L E C T U R E XV.

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We found in the last lecture that two phases of the question presented itself; first, where the party has paid for the goods, and second, where he paid for them after delivery. The rule we discussed in the last lecture applied to those cases where the party had not paid for the goods. The rule for estimating damages there is the difference between the contract price and the market price of the goods. Another rule must be given for the case where the goods have been paid for in advance. If I have not paid for the goods and the goods are not delivered at the time called for in the contract, the measure of my loss is the difference between the contract price and the price which I could have obtained on the market. If the goods are worth less on the market than the contract price I cannot recover anything.

But suppose I have paid for the goods in advance and they are not delivered. I am certainly entitled to have my money back. But plainly I should also have what I intended to make by the contract, that is, the difference between the price I paid for the goods and the market price. The rule as ordianrily stated is this--If a party has paid his money he is entitled to have back the market value of the goods. The sum he actually paid and the intended profits as shown by the market price are both recovered under the one head of market price. But if the market value is less than the sum he has paid, he recovers the original sum.

The case that furnishes some difficulty here is that of stocks and bonds. For example, a man contracts to deliver certain stocks at a certain time and fails to do so and action is brought. In the time the stocks may have gone up or down. Changes probably have occurred in the market between the time of default and judgment. The question is, what price is to be taken in estimating the damages? Some cases have held that the party may take the highest point the stocks have reached in the interval. This opinion is held in the early cases in New York. But in later cases the matter was very carefully examined and the court of Appeals came to the conclusion that if the party had any option of the time for estimating the damages it must only be the time intervening between the default and reasonable time within which to bring action, that time being a matter for the jury. The other rule gives some

possibility for speculation with regard to the contingencies of the market. If there is a corner in the market the party may seize upon that particular time for estimating damages. New York abandoned that rule and most of the courts have followed her example.

Where the goods have been paid for in advance there is some conflict of authority. The decisions of most states permit the recovery of their market value at the time and place of delivery, and some courts, especially in the case of bonds and stocks permit the recovery of the highest market value which the goods have reached between the date of breach and the commencement of the suit, providing the commencement of suit is not unreasonably delayed.

These rules based upon the difference in market values, furnish the measure of damages in all cases in which no unusual or special circumstances appear. In some cases, however, consequential damages may be recovered. Mere speculative, possible or contingent profits cannot be recovered but damages other than the difference in market values can be recovered if they can be proved with reasonable certainty and can fairly be said to have been in the contemplation of the parties at the time they made the contract.

In the ordinary case, if the goods have not been supplied, the difference in makket values furnishes the basis of estimating damages. But there may be cases in which a wider range can be permitted, as in some of the cases given in the book. In one case where a party had agreed to take certain goods and failed to do so it was decided that the party furnishing the goods could recover the reasonable profits. In another case in the south a party had agreed to furnish a certain amount of fertilizer and only furnished half. The plaintiff put the amount that had been furnished over half his land and then sued for the loss in the value of the crop of the plantation for not having the whole amount.

In another case a party had agreed to furnish paris green. He furnished something like paris green but which did not prevent the worms destroying a cotton crop. The plaintiff sued for the loss of the crop. At first the court held that the loss was too uncertain for estimating damages but later it was decided that damages could be assessed for the loss of the crop.

B. The Breach of Warrantee of Title to Goods Sold.

A agrees to sell B a certain chattel. He furnishes the chattel but the title fails. A has no title and B is divested of it. The result is that B loses the chattel. The same rule applies here as where a party has agreed to furnish and has not done so. The same two phases of the question asnin the former case come up here.

Damages for the breach of warrantee of title to the goods sold where the buyer has been divested by a superior title are usually the same as for failure to supply the goods, namely, forst, where the price has been paid the difference between the agreed price and the market price at the time of dispossession, and, second where the goods have been paid for the market v alue at the time of dispossession with interest,
though by some authorities the contract price and interest, the ordinary rule in that case being that the party may recover the market value. There are a few cases in which the rule in real estate is applied, that is, that you simply get back the contract price.

But in order to recover more than nominal damages in either case the buyre must show that he has actually been dispossessed by or has yielded to the paramount title.

C. The Breach of the Warrantee of Quality of Goods Sold. For the breach of warrantee of quality of goods sold, the purchaser is entitled to recover the difference between the actual value of the property at the time of the sale and what its value would have been if the property had been what it was warranted to be. Where the article is sold for a particular use or to accomplish a particular purpose, then the difference between the actual value and the value for the use or purpose contemplated furnishes the measure of damages. If the goods are sold with the warrantee that they are suitable for the particular purpose, and the purchaser in endeavoring to use them for that purpose suffers natural and proximate injury he is entitled for compensation for that injury in addition to the difference in value.

Where goods have been purchased with the warrantee of quality for the purpose of resale and the purchaser, having sold them with the same warrantee is compelled to pay damages for its breach the amount so paid is prima facie evidence of the amount he may recover from his vendor.

If the first purchaser gives his vendor notice of and opportunity to defend the action by the second purchaser, then the costs of that action maybbe added to t e amount to be revovered.

I want to ask your opinion on another phase of this question and we will leave it. Suppose goods are sold on a warrantee and the purchaser rescinds the contract can damages be recovered? Suppose A agrees to sell B a horse and B finds the horse not as stipulated in the contract and rescinds the contract and returns the horse, can B recover damages? May there be any recovery on the contract? May there be any action in tort?

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L E C T U R E XVI.

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D. Breach of Agreement to Buy Goods.

We have considered the breach of agreement to sell, the breach of warrantee of title and the breach of warrantee of quality. We now consider the breach of agreements to take goods. Our case will be this: A agrees to sell to B and B agrees to buy of A a certain chattel at a common price. B refuses to take the goods. What is the measure of damages? What must the seller have to fully compensate for the breach? If the contract has been so far completed that the title may be deemed to have passed, then he may sue for the price. But suppose that the title has not passed. Suppose the agreement is that the title shall pass upon the payment of a certain sum. B refuses to take the article. The loss of A will be the difference between the price B agreed to pay and the market price. If the market price is less than the contract price the damages will be the difference between the agreed price and the market price.

So we have two cases: one where the title has passed, another where the title has not passed.

If the ontract is so far completed as to pass the title, the seller's damages is the agreed price with interest. If there was no price agreed upon, then the fair value of the article. If the title has not passed, then the damages will be the difference between the contract price and the market price at the time and place of delivery agreed upon with interest from the time of default.

In this class of cases it is almost impossible that there should be any consequential damages. The buyer may sustain consequential but the seller is very rarely entitled to them.

Another phase of the question will be this: Suppose B orders of A some article to be manufactured which has no particular market value. Suppose he orders of A some article which has no value to any body else, a picture or statue of one of his ancestors. Suppose he then refuses to take the article upon completion. You cannot take the article into the market and sell it for it has no market value. The only thing to do is to sue the contractor for the time and material spent in its construction.

If goods of an unusual kind for which there is no market are ordered to be manufactured and are wrongfully rejected upon completion the damages are usually the price agreed to be paid.

There is still another aspect. The case I put last is where the goods have been ordered and manufactured and tendered and refused. There the agreed price is ordinarily the measure of damages. But take this case: B orders of A certain goods to be made. The article may be one that has a market value. Now Suppose A repudiates the order before the beginning of the work. A makes a contract with B to make an engine for $1,000. Before A commence work A repudiates the contr act and tells A not to go on. What shall be the measure of damages? Suppose again A has gone some distance in the manufacture of the goods and then B countermands the order. The rule usually applied in these cases is that of the case of Masterson v. City of Brooklyn. The measure of damages is usually the profits which the contractor expected to make from the contract. If the order is revoked before the manufacture is begun the law gives the plaintiff the amount of profits he expected to make.

But itnis different when the manufacture has begun in some way and the order is then countermanded. This is illustrated in a case in Michigan where an engine had been ordered and the manufacturer had gone some distance in the manufacture. The manufacturer tried to recover the time and material he had spent upon the engine. But the court held that the defendant had never gained the engine and the time and labor spent upon it. The court held that the only basis of action was upon the special contract and upon the defendant's refusal to permit the plaintiff to go on and complete the contract and make t e profits he expected to make. In 121 U.S. 264 the court held that the amount of damages is the profits which would have been made if the contract had been carried out.

If goods are ordered and before their manufacture has begun the order is revoked the measure of damages is usually the profits which would have been made if the contract had been completed.

121 U. S. 264.

If the order is revoked after the goods are partially completed then the damages must depend upon the circumstances of each case, being such as will compensate the plaintiff for the loss he has sustained from not being permitted to complete the contract.

Hosmer v. Wilson, 7 Mich. 294.
74 Am. Dec. 716.

X. Damages for Breach of Contracts Concerning Real Property. The first subject I shall take up under this head is the breach of the mondees agreement to buy.

A agrees with B to sell to B a certain piece of real estate and B agrees to buy that real estate and to pay a certain sum. A does what he con to carry out the contract. But B refuses to take the property. What is the measure of damages? In the case of personal property we found the measure of damages would be the difference between the market and contract prices. The same holds true here. Supposo A makos out a doed and gives it to B and says: Here is your property, and then he sues for the price. Some courts have decided that this may be done, though the majority are against this mode of procedure, for the reason that the tender to B is not a full tender of the property. The ded must be taken by B. Many courts hold that if A has done all that can be done the titlo has passes and that then A can sue for the price. But most courts hold that the title cannot be passed by giving the deed whetle r B accepts it or not. You cannot treat it as a chattel. If the deed is not accepted the only thing you can do is to keep the deed and the title and sue for damages. If the contract price is higher than the market price he can recover the difference. If the price is less there is no motive for action.

Where the vendd refuses to buy as agreed the seller's damages by weight of authority is the difference botwcen the contract price and the valuo at the time of the breach with interest A few American cases permit a seller who has tendered a deed and done all required on his part to recover the contract price.

There is no quostion as to the weight of authoritybin that matter. The weight of authority is greatly in favor of the rule as above stated.

B. Breach of the Seller's Agreement to Sell. A has agreed to sell to B a certain lot of land for a certain sum. When the time comes for making the conveyance, the buyer is ready to pay the sum but the seller refuses to make the conveyance. The circumstances here are just the reverse from in the previous case. A has agreed with B to sell a certain piece of property for $1,000. B lays down the money and demands the deed. What will be the measure of damages on A's refusal to make the conveyance? Is the seller of land is responsible the difference between the contract price and the market price? As a matter of fact this is not the case. This is one of the peculiarities of the subject, in which the rule of Hadley v. Baxendale does not apply. The courts distinguish between the case where a man can convey and where he does not want to convey. This distinction was laid down in the early English case of Floreau v.

Thornhill. In this case the defendant had agreed to convey a certain piece of property. When the time came for the conveyance he found that his title was defective and that he could not convey. The court held that the party was not liable, for when the contract was made it was understood that the party could make over a good title; that was the condition of the contract. The courts make a distinction between the case where a man acts in bad faith, where he can convey but wont, and the case where he acts in good faith, where he does not convey because he cannot. The courts in early times treated the contract as completely annulled. The majority of courts in this country follow this rule. They give nominal damages. Some courts repudiate this rule and say that the same rule should apply here as in the case of chattels. But the weight of authority in the U. S., especially with the addition of English cases is in favor of the old rule.

In the case of Floreau v. Thornhill the court held that the contract was conditioned upon the good title to the property. This is explained somewhat by the circumstances. At that time the titles to real estate in England were in a confused state. There were no public records and hence a man could never be sure that his title was good. But now we have records and can tell definitely the actual title to property. On this account some American courts repudiate the rule. The only reason courts can confer for holding to the old rule is that it has been followed so long.

If the seller acted in good faith and refused to convey because of a previously unknown defect in his title the English cases and the weight of American authority permit the vendee to recover nominal damages only in addition to what he may have paid upon the purchase price. Some American courts in these cases and all courts where the seller acted in bad faith permit the vendee to recover the difference between the actual value of the land and the price which he was to pay for it.

21 Mich 374.

In this case the court had occasion to pass on this question and applied the English rule. It was given while Judge Cooley was on the bench and shows clearly why the English rule should apply. 6 Wheat. 109.

This gives the other view of the matter.

Floreau v. Thornhill. 2 W. Blackstone's Reports 1078
40 n. Y. 59.

The last case shows why the English case should not apply now.

76 Md 281.
75 Neb. 429.

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L E C T U R E XVII.

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I have still one other matter under the general subject we were dealing with in the last lecture. Damages for breach of contract concerning real property has been disposed of, so far as regards the agreement to buy and sell. I have still the question of the breach of the Seller's covenants contained in the deed of the grantor. Those covenants are of two general classes, covenants against encumbrances and covenants for title. I will speak first of breach of covenants of title. We found in regard to chattels that if A sells an article of personal property to B with an express or implied warrantee of title, if the title fails, the party to whom he sell the chattel is entitled to recovery of the property. In regard to real property there are several difficulties in the way of applying that rule. A few of the courts have applied that rule but you readily see how room for difficulty arises. For example, if A to-day sells to B a horse, if there is any difficulty about the title to the horse it is likely to arise in a comparatively short period of time, for horses do not live long. Compare that with the sale of real estate. A may sell a piece of real estate and give a warrantee of title. Those warrantees pass from hand to hand so that the question in regard to the liability may arise 5, 10, or 20 years hence. The fact of a long period of time intervening causes the difficulty. Chattels are not likely to fluctuate in value very rapidly but real estate may fluctuate very rapidly in a few years. Suppose a settler here fifty years ago sold his property of fifty acres. This land is now incorporated in a city. The title is now found to fail. Shall the person who sold the land be held for the value of the land at the time the error is discovered? Suppose the property is afterwards found to be rich in minerals and oil. Shall the original grantor be held for the full value of the land? Suppose A sells to B a $1,000 lot and B puts a costly house up on it. The title is then found to fail. Shall A be held for the value of the land and also for the value of the residence upon it? Most courts have held that the difficulties in the way of applying that rule worked too great hardship. But still no rule that courts have thus far arrived at seems to be free from hardship or injustice.

The only thing to be done is to adopt the rule that in the majority of cases works the least injustice. That rule is the rule granting the return of the consideration. In the case of the chattel you recover its value at the time of vacation of possession. In the case of real estate you get back simply the consideration. The actual sum paid for the land is evidence of the value.

C. Breach of Vendor's covenants.

1. Breach of Covenants of Title. For the breach of the vendor's covenants of title the measure of damages, if the breach be a total one, and the buyer has been evicted, is in most states (Conn., Me., Mass., Ver., being exceptions) the actual consideration paid at the time of the sale, with interest thereon since the buyer lost the rents and profits of the land.

The four states mentioned are the only ones, so far as I am aware, that have refused to follow the general rule. There was for a while in Iowa a tendency to depart from the general rule, but the courts in the later cases have gone back to the old doctrine.

The courts of the four states mentioned seem to apply the rule of personal property. This would seem to be the natural rule, and would be, but for the considerations and the difficulties in the way of its application that I have mentioned, namely the long time that may elapse between the breach and its discovery, and the value that the owner may have added to the land. A sells a piece of land to B for $5,000, B sells it to C for $4,000, C to D for $3,000, D to E for $2,000. The title is then found to fail. Shall E recover from A what A received from b, or recover simply what he paid to D? B would plainly be entitled to $5,000 and there is some reason for saying that he passes on his right to recover $5,000 to his successors. The case of Black in the Case Book discusses the question, and I simply refer you to the discussion there contained.

If the breach be partial, then the measure is the proportion which the part taken bears to the whole of the land. If, for instance, the title fails as to half, half the consideration is recovered.

When the vendee in good faith buys in the outstanding title, he may recover what he paid for it, not exceeding the original purchase price with interest on the amount so paid.

2. Breach of Covenants against Encumbrances. The vendor sells real estate and covenants that the title is free from encumbrance. As a matter of fact, at the time of conveyance there is an outstanding mortgage on the property. There is consequently an immediate breach of covenant. But for a while, suppose, the vendee has remained in unquestioned possession. He has not lost the land, neither has he paid off the encumbrance. There is simply a technical breach of contract. He can recover only

nominal damages. But if he suffer loss from the encumbrance he may recover the loss. He may go and buy in the mortgage and then sue the vendor for the amount he paid for the mortgage, but not above the value of the land. Or the vendee may find that there is a railroad right of way through the land. Now that is something he cannot remove. It is not like an ordinary mortgage, it is an encumbrance but no a removable one. In that case the vendee can only recover for the diminished value of the property. There are then these several cases:

1. Where the vendee simply discovers an outstanding encumbrance.

2. Where he has actually suffered loss from the encumbrance, where, for instance, the mortgage has been foreclosed. Here he can recover the consideration.

3. Where the vendee finds a mortgage and he buys it up. Here he can recover the amount paid for the mortgage but not exceeding the original price of the land.

4. Where there is an encumbrance on the land which cannot be removed. Here he can recover only for the diminished value of the land.

Where the vendee buys in an encumbrance he must do so in good faith and reasonableness. He must not pay an exorbitant price for an insignificant encumbrance.

If the buyer has not been evicted and has not satisfied the encumbrance, he may recover nominal damages only. If he has lost his land by the mortgage he may recover the original purchase price with interest. If he has removed the encumbrance he may recover what he has fairly and reasonably paid for that encumbrance, not exceeding the original purchase price with interest. If the encumbrance is one which cannot be removed, he is entitled to compensation for the diminished value of the land.

Breach of Covenant between Landlord and Tenant. The rules in this branch are s similar to those we have already considered and as also stated in the case of Hadley vs. Baxendale that I shall not go over them in detail. A consideration of a few examples will show the rules that govern. If a man agrees to put me in possession of a certain property at a stated time and then fails to do so, my recovery is for myblos$ in not having possession. If the rent is $100 and the property is really worth $120 to me, my damages would be $20. If I go in and some superior title sets mine aside, my recovery will be for the value of the title to me for the remainder of my term. If a tenant agrees to go into possession on a certain day and refuses

to do so, the landlord is entitled to recover the difference between what he was to get from that tenant and what he could get from another tenant.

IX. Damages in Actions against Carriers. Now there are two classes of carriers, the carriers of goods and the carriers of passengers. The common carrier of goods stands upon a different footing from the common carrier of passengers. Damages against common carriers of goods can be recovered in case of injury caused otherwise than through negligence. The common carrier of passengers is bound only for injuries to the persons of passengers caused by negligence. In the case of goods, the only injury that the shipper sustains is the loss of the market of the goods or of their use. His loss is one readily ascertainable by the current market value. The difference in the market value at the time the goods should have arrived and the time they did arrive is the measure of loss. This is not the case in the injury to passengers. There are certain obligations which the law imposes upon the carrier of goods besides those of the contract. In modern shipping there is often a bill of lading or contract made out between the shipper and the carrier. But such a contract is not necessary. There is a common law duty upon the carrier to carry the goods safely and well and promply. But a party may sue either upon the common law obligation or upon his special contract. He may sue either in tort or in contract. If he sues in contract he may recover exemplary damages, which he cannot in tort.

a. Actions against Carriers of Goods. Now let us consider the form which the carriers default may take. He may refuse to take the goods at all. This is the most radical wrong he may commit. Or he may take the goods to their destination but delay them upon the way; or he may take them and through his fault they may be totally destroyed. Or they may arrive at their destination but in a damaged condition. Each of these cases requires brief consideration.

1. Refusal or neglect to carry. If the carrier wrongfully refuses or neglects to carry the goods at all, the measure of damages is usually the difference between the value at the point of shipment and the place of destination at the time they ought to have arrived there, less the freight.

In the ordinary case you see that a man pays money to have goods shipped because they are worth more to him at the place of destination than at the place of shipment. Thus in the ordinary case the measure or damages would be the difference between their value at the place of shipment and at the place of destination.

If the plaintiff has caused the goods to be transported by other reasonable means, he may recover the excessive cost if any.

Suppose the common carrier refuses or neglects to carry the goods. The owner has them transported by some other means at a greater expense. The plaintiff may reoover the difference in the cost of transportation. But he is limited by the duty to use discretion and act as a reasonable man. If the carrier is a railroad company and refuses to carry saw-lumber, the plaintiff cannot send the lumber by express and then recover the difference. He must act with prudence and reasonableness.

If the carrier knew that the goods were destined for some particular use and failed to carry them, then their value for the contemplated use may be made the basis for estimating damages.

For delay in transportation beyond the agreed time, or, if there was no agreed time, then beyond reasonable time, the ordinary measure of damages where the goods are intended for sale is the difference between the market value when they did arrive and when they should have arrived, with interest from the latter date. Loss of a particular market or sale cannot be recovered for unless the carrier untertook the transportation with knowledge of it. If the goods were intended not for sale but for use, then the value of the use during the delay furnishes the measure of damages.

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L E C T U R E XVIII.

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We have now disposed of the question of refusal to carry at all, the delay in carriage, and the failure to carry all the goods. There are two other cases yet which constantly arise. That is, where the goods are carried but are delivered in a damaged condition, or where the carrier takes the goods and attempts to carry them but destroys them in the process of transportation. We need not spend much time in asking what must be the measure of damages in case of either violation of the contract to carry. If, for example, the carrier has delivered the goods in an injured condition, his contract calling for delivery in as good condition as when received, the damages must be the difference in value between the market value of the injured goods and of the uninjured goods. Now then, intensifying that rule, if instead of injuring he fails to deliver at all, the owner loses what the goods would have been worth if delivered, so usually the damages are the market value of the foods where there were to be transported to less freight. All through this subject I have been speaking of the market value. The guage of the value of an article is not the store the owner sets by it, nor the value he places upon it, but the value the average person, the market places upon it. It is not what it cost the owner or somobody else, it is the market value. It would seem that what I paid for the article would be some evidence of the value, but the law does not consider it as any real evidence of value. The question always is, what is the fair market value, what is its value to other persons.

Damages for Loss of, or Injury to Goods. Where the goods are lost or injured by the carriers fault, the measure of damages in case of injury is the diminution in value at the place of destination, and in case of loss, the entire value they would have had at the place of destination, less the freight of cost of transportation.

If the goods are such as have a market value, then that value is to be made the basis of recovery; if they have no market value then their actual value is to be ascertained by the best evidence available.

I say that market value is ordianrily the criterion. It always is the criterion where it can be applied, but there are some cases where it is impossible. I recall a case like this:

an imigrant going west had shipped his goods by freight. When he arrived at his destination he found that his goods had been lost. There was no market for the goods at the place of destination. The courts held that in that case the value could not be ascertained by putting the goods up to a forced sale in a place where there was no buyer. The valuo of the goods were to be assessed upon their actual value to the owner.

The value of articles designed for a particular use can only be considered where that was in the contemplation of the parties at the time they made the contract.

B. Damages against Carriers of Passengers. Thore are tow kinds of cases in which an action can arise against carriers of passnagors. One of these two fields can be suhdivided into three others and the other field stands alone.

A cause of action may arise against a carrier of passengers in one of four classes of cases. 1. Where the passenger is injured through the negligence of the carrier while entering, riding in, or leaving the conveyance. 2. Where the carrier or his agent denies or invades the passenger's right as a passenger. 3. Where the carrior fails to protect the passengor either against his own servants or strangers. 4. Where the carrier fails to give the passenger such a tickot as he is entitled to, or fails to carry the passenger at the time or to the place or in the manner agreed upon, or otherwise fails to perform the ticket contract. In the first three oc these cases, the passenger has usually his choice of actions, whether in contract or in tort, but the tort action is usually more effective and gives wider scope for damages. In the last case the passenger's right is based upon the special contract and his action must be for the breach of the contract.

Every case against a carrier of passengers may be groupod undermone of these four heads. The first class perhaps includes the greater number of actions, namely, where the passengor is injured while entering, riding in, or loaving the vehicle. But if he be carried, he must be given his rights as a passenger. He may be deprived of his seat, or he may be kept on the car. There ordinarily he may resort to tort action. If he is not protected by the carrier against assault, he may have recourse either to tort or to contract action. Where the tickot calls for taking the passenger to a certain place within a certain time the right is based upon a contract and the passenger must sue upon tho contract. In the former case he may sue at his option in either tort or contract. Less nicety of pleading is requisito in the tort action and a wider range of damages may be rocovored than in the contract action.

A passenger who sustains personal injury through the wrongful act of the carrier is entitled in an action of tort to recover compensation for his injury, which may include his inconvenience, annoyance, loss of time, expense incurred, past, present, or future pain and suffering, permanent disability and any other loss which naturally and proximately follows from the wrong committed.

If the injury was the result of negligence so gross as to evince a reckless disregard of the rights of passengers, or if it was committed wantonly, wilfully, or maliciously, then exemplary damages may also be recovered in those states which permit them.

In the great majority of tort actions those are the elements for which compensation may be given and the great majority of actions against carriers fall under that head. We shall have to deal in a moment with a narrower field of contract actions. I want to note forst the conflict between English and American decisions in the matter of consequential damages which may be recovered.

The English cases and some American cases seem to limit the consequential damages to those which might have been expected to result from the injury, but where the action is in tort, the weight of American authority permits the recovery of damages for whatever injuries prove to be the natural and proximate consequences.

Those of you who have read the case of Lewis against the R.R.co. will recall the reference to the English and American cases there given. Courts have limited the dam ages which can be recovered to those which might be expected to follow from the wrongful act or negligence. The leading English case on the subject is that of Hobbs against the R.R.Co. Very much of the authority of this case has been removed by later decisions. Before the English courts got around to properly state their own rule, the American courts began to follow the early English cases. Thus it was held that if a person in delicate health suffered damages which a healthy person would not have suffered, such a person could not recover more than a healthy person unless the R.R.Co. had knowledge of his state of health.

Hobbs v. R.R.Co. Eng. L.R. 10 Q.B. Ill.
Pullman v. Bartlett, 4 Col. 344, 34 Am. R. 89.
Lewis v. R.R.Co., 54 Mich 55, 52 Am. R. 790.
Brown v. R.R.Co., 54 Wis. 342, 41 Am. R. 41.
Heirn v. McKon 32 Miss. 17, 66 Am. Dec. 588.

Where the wrong complained of is a failure to give the passenger a proper ticket, or a failure or neglect to carry him in accordance with the special contract, then by the weight of authority the action must be based upon the contract, and the damages

can be those only which were contemplated, and exemplary damages cannot be recovered.

In this class of cases the conflict is more pronounced and the difficulties in the way are the most insurmountable of any with which we have to deal. You doubtless have come across this conflict of cases in the matter of contract in the Law of Carriers. The cases can generally be divided into two fields. The leading case in one line is Frederick v. The R.R.Co. which was decided in Michigan. In this case the court laid down the rule that so far as the passenger and the conductor of the train are concerned, there can be only one criterion of the passenger's right to be carried, that is the ticket. The passenger must submit to the demands of the conductor and must comply with the right which the ticket gives. From this case two subsidiary decisions run out, one saying that if the ticket is right and fair upon its face, the rule applies, but if not, the rule does not apply. This rule lays upon the passenger when buying his ticket the necessity of seeing that the correct one is given him. If he thinks he has a ticket to Detroit while in reality he has been sold a ticket to Ypsilanti he is entitled to go only as far as Ypsilanti. But if the ticket is apparently good on its face, but from some regulation or secret rule or otherwise the conductor cannotrecognize it, the ticket entitles the passenger to ride but does not compel the conductor to recognize it in his relations with the company. The cases in the South seem to hold that it is no part of the passenger's duty to see that he gets the right ticket. In the Frederick case in this state Judge Sherwood said that the conductor was bound to take the passenger's word as to what he had contracted for but that he was not responsible for the mistake of the agent. But I think that the weight of authority is on the other side.

There are then these two cases, the one holding that it is the passenger's duty to see to it that he gets the right ticket, and the other holding that he has no duty whatever and that his statement is evidence of the ticket he contracted for and that his statement is presumptively true. If his statement is true, that furnishes the measure of his right. If he is ejected he is not obliged to act upon the contract or in tort .

Frederick v. R.R.Co. 37 Mich. 342; 26 Am. R. 531.
56 N.Y. 295. 53 Mich. 118.
21 Or. 121 34 W. Va. 65.
6 S. Dak. 235. 95 Ia. 98.
86 Ga. 744.

The Georgia case is one on the other side, holding that the passenger has no obligation to see that he receives the right ticket.

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L E C T U R E XIX.

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The subject which I will take up this morning is actions for damages against Telegraph Companies. You doubtless know that there has been a great deal of controversy upon the question of whether a telegraph company is a common carrier. Some courts agree that it is a common carrier of intelligence, but most courts do not consider it a common carrier. The telegraph is of a recent invention and application that the subject is not yet supplied with rules. It is necessary to invent new rules or to apply old ones, old common law rules as far as they are applicable. Sometimes the rules governing common carriers are applied. It is possible of course to have action in contract against a telegraph company, because almost invariably the message is written on the company's blanks which usually contain the conditions of sending the message. Most courts hold that there are a great many opportunities for actions for torts. Of course the statutes of the states may impose duties upon the telegraph company and give the party who has been injured by the violation of the statutory provision an action for tort or penalty and those would of course be statutory actions. The relation between the sender of the message and the company being a contractual one, most courts agree that whether the action is in tort or in contract, the damages are to based upon breach of contract. Damages against the telegraph company are assessed upon the contract theory. A great majority of courts in this country have adopted the rule of Hadlye v. Baxendale as peculiarly applicable to cases against telegraph companies.

XII. Damages in actions against Telegraph Companies.

Damages in actions against telegraph companies for negligence in transmitting or delivering messages, whether the action be in contract or in tort, are by the weight of authority computed according to the rule in Hadley v. Baxendale.

In the ordinary case we readily see how that rule applies. A person proposing to send a message comes to the office and delivers his message written out. The character of the communication appears upon its face. The company sees the nature of the message. In case of non-delivery then the damages to be recovered would be those for injuries which in the ordinary course of affairs would result from the non-delivery of such a message. If the party informs the company

that an unusual consequence will result from the non-delivery, then the second branch of the rule will apply. About this case there is substantial uniformity. The disputed field is where the message does not show upon its face its character and the risk attendant upon a failure to deliver. The telegraph company is unable to determine its nature. The great majority of courts have held that where the is a message of this kind that does not disclose upon its face its nature and the unusual risk which attaches to failure to deliver, that in such a case nominal damages only can be recovered. Where the message is in cipher and the company is not apprised by some extrinsic evidence of its character, then the only risk the company runs is nominal damages and the price paid for the transmission of the message. Some courts hold, however, that it makes no difference whether the message is intelligible or not, that damages can be recovered for the injury or loss caused by its non-delivery. But the majority hold to the other rule. The former courts say that when such a message is received by the company, it is its duty to insist upon knowing the contents of the message.

Where the message is in cipher, or is otherwise unintelligible, and the company is not informed of its meaning or importance, damages for negligence in transmitting or delivering it cannot, according to the weight of authority, exceed the price of transmission.

This rule applies in all states except Ga., Ala., Miss. In these states the courts hold the company just as much liable for a message in cipher as for one written out intelligibly.

Now there are cases where the message lies in the border line of the intelligible and the unintelligible, where a part is intelligible and a part written in cipher. Where the message does not disclose enough upon its face to apprise the company of the fact that it relates to some transaction of importance, then the general rule applies, and the company is liable as in the case of the entirely intelligible.

But where the message, although not fully intelligible, shows upon its face that it relates to commercial transactions, or the party otherwise sufficiently informs the company that the message is important, full liability will attach.

One other matter in the telegraph field gives difficulty and arouses almost as much controversy as the one we have been discussing. It is typified by telegrams of this character: Some one is ill, or dead or dying and the telegram is for the

purpose of apprising a relative or friend of the fact, as in a late case where a father was away from home and the mother sent word to him that the child was sick and dying. Through negligence or delay of the company the message is delivered too late or not at all. Can damages in such a case berecovered for pain of mind? The Texas cases were the pioneer cases in this field. They decided that damages could be recovered in such cases for pain of mind. The decisions of the Texas courts have been followed by the courts of five other states. But in the majority of states this rule is not recognized. We shall find further on that there is a general law in the field of damages which declares that purely mental injury, pain of mind, cannot be compensated. Whether a man has sustained mental injury or not is a question so difficult to settle that the courts will not undertake to award damages for that alone, the majority of courts holding that unless the party has suffered pecuniary injury or physical suffering the court will not give damages for the merely mental suffering.

Mental suffering alone caused by the delay or non-delivery of a message, but not accompanied by any physical injury, cannot by the weight of authority be compensated in damages.

The case of Connelly vs. Telegraph Co. gives the reasons pro and con and a resume of the subject. The states where the contrary rule prevails are: Tex., Ind., N.C., Ken., and Tenn. Here courts have held that there may be recovery for mental suffering. A very recent case refusing to follow the line of decisions in the states I have mentioned is reported in 58 Minn. 252.

XIII. Damages for Causing Death. You know from your study of torts and from other sources, that a well settled principle of the common law was, that no action would lie for damages for causing the death of a human being. The reasons for this have not been made very clear. Some hold that the rule was based upon a repugnance among civilized nations to place a price upon human life. The rule is abundantly established. The action died when the person died. He was the only one who could bring action for his injury. But it held by some that the cause of action can be passed on to others. In some states the statutes allow the survivors to recover damages for causing death. But where this is the case, the action must be brought entirely within the lines of the statute. Damages can only be brought for the losses named by the statute, and can be recovered only by the persons allowed by the statute. At one time it was common, and some states still retain the rule, to limit the amount that could be recovered. The limit was usually $5,000.

At the common law no action lay to recover damages for the death of a human being, but by statute such an action is now given both in England and in the United States. This statutory action is not usually a survival of the action which the party injured might have brought, if death had not ensued, to recover damages for his own injury, but is a new action for the recovery of damages which those who survive him have sustained by his death.

If we had the time it would be an interesting and a profitable matter to go into the history of these statutes. As you see, there were two things that the legislatures could do. One thing which it might have done would have been to obliterate the common law rule by allowing the action to survive instead of dying with the injured party. If that hadbeen done, and it has been done in some states, the damages that could have been recovered would have been the damages that the injured party himself would have recovered if he had not died. The other course open was to give an entirely new action for the benefit of those surviving him for their loss of support, maintenance, or protection. Most actions are of the latter sort. In some few states both causes of action exist. There is a sort of joint action for the benefit of survivors and also for the injuries which the party would have suffered if he had not died. In most states there is an entirely new and distinct action, no survival of the old action. The distinctionmis material in this respect, that when you bring the now action you do not recover for what the deceased has suffered, but simply for the injury done the survivors. The circumstances of his death, whether he was killed in a cruel and heartless manner, whether he suffered intensely, is not material at all. The statutes limit the damages to the exact pecuniary damages.

Under most of the statutes, the damages to be recovered are by the express terms of the statute to be measured solely by the pecuniary injury which the surviving husband, wife, child, or next of kin may sustain by reason of the death. Their grief or mental suffering cannot be considered. There are three states where the statutes do not so limit. Those states are Cal., Va., and S.C. In those states the statutes do not in terms limit the recovery to the pecuniary damages but entitled the survivors to recover for the mental suffering.

Under these statutes it is not the pain, suffering of the deceased before his death which are to be compensated for, but the loss which the persons in interest sustain after his death and by reason of it. The amount to be awarded, under the ordinary statute, is compensation for the loss of the pecuniary assistance and support which those entitled might reasonably have expected to receive from the deceased had he lived.

Take a typical case which frequently occurs, where the father of a family loses his life through the wrongful act of a third person. What are the elements to be considered? It is not the sorrow of the survivors or the loss of anything which cannot have attached to it a pecuniary value. It is the pecuniary assistance and support which the children might have expected up to the time of their majority, or the support of the wife during her lifetime. It is an arithmetical computation of whatthe man's life was worth in money. The life of one man may be worth more than that of another The life of a man of eighty years is worth less than that of a man of 25. A man of vigorous health is worth more than a man who is feeble. It is a determination of the money value of the life which has been destroyed. In determining that you take into consideration his age, his earning capacity, his health, his probable duration of life. If a man is forty years old and earns $1,000 a year, the supposing him to have twenty more years of life, his life would be worth to those dependent upon him $20,000, deducting, of course, an amount for interest. The award would not be $20,000. The courts have adopted two rules to guide them in giving awards. One is to ascertain the present value of a life which will bring $1,000 for twenty years. The second is, how much would it cost to purchase an annuity for this amount for twenty years? This can easily be determined by applying to the insurance companies.

So absolutely confined to pecuniary loss is this right that in Texas in a recent case where it appeared that the plaintiff was receiving pecuniary assistance from the deceased and that he was also the heir the court held that there was no cause for action, as the plaintiff had gained more by the death of the testator than he would have obtained had he lived.

In the case of an adult, his age, health, habits, earning capacity and probable duration of life are to be taken into consideration in estimating the pecuniary value of the life of the deceased to the persons for whose benefit the statute gives the right of action.

In a case where a wife brought action on account of the death of her husband who had been a drunkard and had been supported by her, the court held that there was no cause for action, as the plaintiff was actually benefitted by getting rid of the deceased.

In the case of the death of a child, the measure of the parent's damages under the statute is the probable value of his services until majority, less the expense of his maintenance until that time.

In other words, in the case of a child, it is the difference between what he is worth and what it would cost to raise him, and in the case of most children I know the difference is exceedingly small.

In an action by a child for the death of a parent, the pecuniary value of the parent's care, instruction and training may be considered as well as the mere loss of support. Exemplary damages cannot be recovered unless the statute so provides, as is the case in Ken., Va., Mo., Wash.

In order that any damages at all may be recovered, it must appear that there are persons of the class for whose benefit the statute gives the right of action, and a loss to other persons than those named in the statute cannot be considered.

The statute specifies in the first place the persons to whom the damages may be given. To obtain damages at all, it must appear that there are persons of this class, and if you cannot show that persons of this class have sustained injury, you cannot go outside of the class.

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L E C T U R E XX.

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XIV. Injuries to Property Injuries to Real Property. Evidently there are very few special rules that need to be considered in connection with the matter of real property. For most cases of ordinary trespass the general rules applicable to tort cases apply. We have simply to apply the doctrine of compensation with reference to a larger order of consequential damages. For most cases that we will have to deal with, the general rules of tort are applicable.

For trespass and other injuries to real property the damages will be at least nominal and will be designed to compensate the plaintiff for the loss naturally and proximately caused by the injury, whether by the way of diminution in value, or by loss of use. Where portions of the reality have been taken and carried away, as where timber is cut from the land, ar minerals are removed, the measure of damages is in dispute.

Let us see for a minute why and how such cases arise. Take for example land having upon it valuable timber trees. In this state as in many of the northern states the land is chiefly valuable for the timber upon it. Many parts of the state have no value but for the timber. Suppose that timber is wrongfully, wilfully, or perhaps mistakenly, taken away. What is the measure of the owner's damages? Two theories prevail in regard to this question. One theory states that when the timber is taken from the land, the measure of damages is to be established at the time the article is severed from the realty and thereby becomes personalty. Before a tree is felled it is a part of the realty. Before the tree is actually cut off, the owner can recover damages by trespass. But when the tree is once cut off it is a part of the personalty. Then if the plaintiff wants to recover the value of the personalty it is clear that he should get the value of the personalty at the moment it was converted into personalty. The defendant gets no benefit from the labor he has spent in converting the property into personalty, whether it be by mistake or otherwise. The plaintiff must take the personalty immediately after its creation. The rule is the same in regard to mines. The coal veins in my estate

are a part of the realty, but the moment the coal is knocked off it becomes personalty. The rule is stated in two ways: either the plaintiff may recover the property immediately it is severed, or secondly, he may recover its value when drawn to the surface, less the cost, not of knocking it off, but of bringing it to the mouth of the pit. If you deduct the cost of getting it up you have the value of the article as it lay in the shaft. But the view that prevails in the majority of states is somewhat different, that is, in the case of timber trees and coal or iron mines, the measure of damages is the measure of value of the article as it stood before it was changed from realty into personalty; in the case of a tree, as the tree stood; in the case of minerals, as they lay in the vein.

Injuries to the soil in removing the personalty. If in opening a mine upon my premises the defendant disturbs my soil, I would get in the first place compensation for the value of the minerals as they lay in the vein, and secondly, for the loss to the land resulting from the opening of the mine. In the case of trees, I would get the value of the trees together with the loss caused the land by the party in going on and getting off the trees. In the first case you get the value of the property before any labor has been expended upon it. The second rule makes this distinction: If the articlehas no valuo apart from the soil, you must treat the damage as a damage to the soil. In a case in New York fruit trees were destroyed. The court said in this case that a distinction must be made in the case of property having a commercial value apart from the land, and property having no commercial value apart from the land, such as fruit trees and shade trees. When it is valuable only because annexed to the realty, you must treat it as a part of the real estate and recover damages accordingly.

If the property was taken by mistake or accident, the weight of authority is to the effect that the value of the property taken, if it has a commercial value apart from the land, estimated in the position in which it was before severance took place, together with any injury to the soil in removing it, constitutes the measure of damages. If it has no commercial value, then the difference in the value of the land caused by the removal is the measure.

That is the rule prevailing through the majority of the states. We are speaking now of cases where property is taken by accident or mistake. If the property has commercial valuo apart from the land, then the value of the property as it stood before severance, together with any incidental damage caused the land in removing it is the measure of damages. If, on the other hand, it has no commercial value, you treat it as a pure injury to

the real estate, and the difference in value of the real estate is the measure of damages.

In Ill., N. H., Md., and Col. the value of the property immediately after the severance and before removal is the rule for measuring damages.

Those have all been cases where the party has acted in good faith and mistakenly. Where a man goes on the land wilfully and commits the injury a different rule is applied. In the first case the amount of damages is reduced to the lowest possible sum. According to the rule in the four states mentioned above the defendant loses a little more, that is, he loses the cost of his labor. But where a party acts in bad faith, the law gives him no allowance for his labor or the increased value he has given the article.

Where the article is wilfully or intentionally removed, the measure of damages is the value of the article at the time and place of demand, with interest, even though the value has been greatly increased by the wrongdoer. He must, according to the weight of authority, answer to the true owner for the increased value.

If timber has been wilfully taken, if there is a wilful trespass, so that the party may be said to be an intentional wrong-doer, the law deals harshly with him and the owner of the land, and therefore of the thing, that has been severed, can demand his property in any place and at any time that he finds it. It does not make any difference how much it has been increased in value. Apparently it does not make any difference how much it has been changed in form, if it is still the identical article. Take for example the timber on an estate. Say the value of the timber as it stands is $1 per thousand feet. Taken to the mill it is still worth more. When it has been sawed up into planks it is worth more yet. Made into furniture it has a greatly increased value. Then if the owner finds it he can recover the value of the article as it is. He can sue in trover or replevin. He may take the value of the article in money wherever he finds it or he may take the article itself. In the case of Boles Wood Works Co. v. U. S. timber had been taken by the Indians from the government lands and was sold to the company which used it in making furniture. The U. S. recovered the value of the timber in its highly improved and valuable state.

But if the articles have been transferred by the wrong-doer to an innocent purchaser, the latter can usually be held liable to the true owner for their value at the time of their transfer.

Those rules will cover all the cases we have to deal with in regard to real property. In the ordinary case of trespass the injury done is the measure. If the trespasser has destroyed a crop, the estimated value of the crop is the measure. But in

in those cases where he has taken something from the land and carried it away, if it has commercial value, the the value where it stood, and if it has no commercial value, its value to the land. Where the party is a wrong-doer intentianally, the value of the property wherever found is the measure of damages. In the case of wantonness or maliciousness, exemplary damages can be recovered in addition.

Personal Property. Obviously the three chief wrongs which can be done to personal property are 1. To absolutely destroy it; 2. to injure it; 3. to delay it. If the property is absolutely destroyed, the value of the property with interest is the measure of damages. If it has been injured, but not destroyed the diminution in value of the property is the measure of damages. If the property has been injured in any way, then the extent to which the injury diminishes the value is the measure of damages. If it has been detained, then the loss of use of the article is the measure of damages.

In the case of the destruction, conversion, detention, or injury of personal property, the measure of damages for its destruction or conversion is actually its value at the time such destruction or conversion took place, with interest. For injury to it, the amount it is diminished in value by reason of the injury, with interest, and in the case of detention, the value of its use during the period. To this amount may be added compensation for such incidental losses as were caused by the wrongful act and were in the contemplation of the parties, when the action is based upon contract, or were natural and proximate when the action was founded upon tort.

Now ewe have one rule corresponding to the rule in regard to the change of realty into personalty where the damages vary with the good or bad faith of the wrong-doer.

Where personal property has been converted and afterwards increased in value by the wrong-doer, the measure of damages, if it was taken in good faith, is its value at the time it was taken, with interest; but if taken in bad faith, then usually its increased value added by the wrong-doer may be recovered.

In a case in New York a man's corn had been wrongfully and intentionally taken and worked up into whiskey. The process had greatly increased the value of the corn. The court held that the plaintiff could recover the value of his corn in its condition when he found it.

3 N. Y. 379; 53 Am. Dec. 307.

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L E C T U R E XXI.

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XV. Damages for personal Injuries. The specific question would be, what will be the measure of the damages to be recovered for an injury to the person? Naturally in the case of an injury to the person the party injured is entitled to compensation for physical pain. That would be the important and direct consequence ordinarily. The physical pain or the physical injury may result in a loss of time. For that the party is also entitled to compensation. Physical injury may result in necessity for medical and nurses' attendance and that will demand compensation. As the result of the physical pain there may be mental suffering for which also the party is entitled to compensation. If the injury is so serious that at the time the action is brought the party has not yet recovered, he may recover prospective damages.

For injuries to the person the plaintiff may recover compensation for his bodily pain and mental suffering, for the expense of medical, surgical and other attendance, for loss of time and for other disability, or suffering reasonably certain to occur. If the injury was committed wilfully, wrongfully and wantonly, or recklessly, he may have exemplary damages in addition in those states which permit them.

The typical case of physical injury is where there is some actual, tangible, visible injury to the person. But there may be cases of personal suffering where there is no actual injury to the person and where the mind alone suffers. In that field there is at the present time being waged a vigorous warfare to determine whether damages can be recovered. In the majority of states damages for mental injuries cannot be recovered. But in certain cases damages can be recovered for mental suffering. There are cases of this nature as illustrated by a recent case: A passenger was seated in a car at a station when suddenly it appeared to him and to those in the car that a collision was imminent. As a matter of fact no collision occurred, but there was reason to believe that a collision would occur. A passenger in the car was very much frightened, his fright resulting in nervous prostration and physical illness. The question was whether damages could be recovered for the physical injury. I think the weight of authority is that there can be no recovery

unless there is some actual injury. If it is a mere mental injury, there can be no recovery. Many courts hold that the law cannot take cognizance of that which has no tangible evidence. Whether a man suffers mental pain is a question too abstract for the court to go into. I suppose most courts would agree that if physical deformity of suffering came from the mental that damages could be recovered. But for pure nervous injury I think courts hold that damages cannot be recovered. I think that at the present time the weight of authority is against the proposition that mental suffering can be compensated, though there is a number of cases which hold that it can be compensated. The matter is not entirely settled.

Mental suffering alone, unconnected with any injury, cannot by weight of authority, be compensated.

Summerfield v. Telegraph Co. is a case on this subject. In addition I call your attention to the following cases:

86 Ta., 412. 47 Minn. 307.

The latter was a case where a woman brought action for the wrongful dissection of the body of her husband. The only injury she could rely upon was the mental injury. The court discussed the question and decided that though she could not recover for her mental suffering, she had a right to the body of her husband and could recover on that ground. In a later case it was decided that there could be recovery for physical suffering which is the result of mental suffering.

48 Minn. 134. 111 Cal. 220.
151 N.Y. 107. 147 Pa. 40.

The cases upon the question of fright are very numerous and they have developed rapidly in the last few years. The cases cited will furnish the key to most of them.

In actions for malicious prosecution and false imprisonment and still more in actions for slander and libel, mental suffering forms an important element of the damages and in addition for damages for loss of time and business, expense incurred and physical injury sustained, the plaintiff may recover for the disgrace, the humiliation and the anxiety which he has incurred.

It does not need much to show that in that class of actions the mental suffering is the important element. A man is falsely imprisoned. The anxiety, humiliation, disgrace he feels form a chief element of the damages. Also in the case of malicious action the party's mortification forms the chief reason for bringing action. In an action for slander the injury is rather mental than physical. The party suffers humiliation, disgrace, mortification by reason of the charge brought against him. Mental suffering in these cases may be compensated. In some cases the court has held that a party may recover not only for

for his own mental suffering, but also for the suffering which is caused by the knowledge of the suffering and anxiety felt by his friends and family. In a case in California it was held that a woman who had been wrongly imprisoned could recover also for the intensifying of her own suffering caused by the knowledge of the suffering of her family.

XVI. Aggravation of Damages. I mean by this the circumstances that tend to increase or enlarge the damages in one case above those in another where the actual injury is the same. The same amount of physical injury may be done in one case as in another, while in one it would require a thousand dollars, in another a few cents would be sufficient compensation. Suppose a party runs against me unintentionally and causes me personal injury. In that case an apology, or at most compensation for the injury will suffice. But where the act is malicious and wanton the damages are very much greater. It is those contingent circumstances that aggravate damages that I want to consider briefly.

Whatever increases the amount or kind or nature of the actual injury in any case increases to the same extent the amount of actual damages to be awarded in compensation.

In general, the only thing which can serve to aggravate or increase these actual damages is the motive with which the injury was committed. As a rule, damages for breach of contract cannot be aggravated or increased by reason of the motive which inspired it.

In actions for breach of contract the question of motive is unimportant. It is only in tort actions that motive becomes important. We have had three cases where motive does become material.

An exception is made in the case of the breach of promise to marry, in some actions against carriers of passengers, and in most courts, for actions for the breach of covenant to convey real property.

When we get into the tort field the motive plays a very important part. The motive may in every state be made the basis for increasing the damages. Anything committed with wilful motive can be compensated by additional damages. Even in cases where exemplary damages are not recognized additional damages can be awarded for the motive.

In actions of tort the motive is an important element. A wrong motive may increase the damages in every case of personal injury, and its presence or absence determines whether or not exemplary damages may be allowed.

The only other thing besides motive which can aggrevate damages is the question of pecuniary or social condition of the party. As a rule, courts are agreed that motive does not aggravate contract actions but it does tort actions. Courts are not, however, agreed as to whether the pecuniary and social standing of the parties are to be considered. There seems to be a tendency at present to take this element into account. There are some cases where courts have held that pecuniary conditions can be taken into account in estimating the damages.

Whether pecuniary circumstances can be used to effect the measure of damages is a question upon which the authorities are divided. I think that the courts everywhere are agreed that so far as compensatory damages are concerned, the question of pecuniary conditions is not taken into account. But in the case of exemplary damages most courts hold that the pecuniary conditions of the defendant can be taken into consideration. They say that the object of exemplary damages is to punish the wrong-doer. In order to do that you must know how much he has in order to determine the amount of punishment. The degree of the punishment depends upon the ability of the man to pay the damages. Most courts are agreed that in order to make a man feel the punishment you must take into consideration his pecuniary circumstances.

Where exemplary damages are permitted it is usually held that the pecuniary circumstances may be shown for the purpose of aiding the jury in determining how much to award by way of punishment. For this purpose evidence of the defendant's actual wealth has been held admissible in actions of assault and battery, breach of promise, malicious prosecution, slander, libel and cases of gross or wanton negligence.

I want to emphasize here that in this rule it is the defendant's actual wealth that is to be considered. We shall find cases in a moment where the defendant's reputed wealth must be taken into consideration.

In actions of slander and libel, the defendant's reputed wealth and his social and business standing may be shown as tending to give more weight and importance to his charges than to those made by a man of less consequence.

You readily see that the rule has good foundation. A difference should be made between the accusations brought by different men. If a tramp makes remarks degratory to the character of a man, nobody pays much attention. But if, on the other hand, the chief man in the community makes the same charges, everybody would attach greater consequence to the charges and the person

would be injured more. So in these cases for slander the defendant's reputed wealth and his business and social standing may be shown as tending to give greater weight and consequence to his charges than would attach to like charges made by a man of less consequence. So far as the mere question of reputed wealth is concerned, it is not very important, but I think most of us would pay more attention to the charges made by a millionaire than to those of a pauper. So the question of wealth may give weight to charges which otherwise would have no weight. When you take into consideration the business standing very much more importance may be attached.

Evidence of the pecuniary circumstances of the plaintiff is less frequently material. It may be received where exemplary damages are recoverable if it tends to characterize tho nature of the defendant's act, or to show the nature or extent of the plaintiff's injury.

The first two cases I have spoken of is where the pecuniary circumstances of the defendant may be taken into consideration. But less often is the plaintiff's financial standing taken into consideration. There was a case where a man admitted that he had committed a wrong on the grounds of the plaintiff's poverty. He thought he was too poor to be able to resist. In that case the court held that the plaintiff's pecuniary condition could be taken into account. There are other cases in which it appears that the plaintiff was so poor that he could not afford the best means of curing his injury. It has been held that in such cases the plaintiff may show his pecuniary condition and that the injury is greater than it would have been in the case of a richer person. This kind of evidence, most courts hold, is admissible only in cases of exemplary damages. Where exemplary damages may be awarded the defendant's actual pecuniary circumstances may be shown. In case of slander his reputed condition may be shown. In the case of the plaintiff, his pecuniary condition may be shown where exemplary damages are recoverable where it can be shown that the defendant speculated upon the plaintiff's pecuniary condition.

Such evidence has been held admissible in actions for assault and battery, malicious prosecution, seduction, slander and libel, breach of promise to marry, and in cases of gross negligence.

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L E C T U R E XXII.

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At the last lecture I was dealing with the aggravation of damages, trying to discover some of those things which will tend to enhance the amount to be recovered by reason of some incidental circumstances. This morning I want to take up the opposite of that, the question of Mitigation of Damages.

XVII. Mitigation of Damages. I mean by this term ..... the corresponding idea, or the counterpart of aggravation of damages. In the last lecture the question was what incidental circumstances might tend to enhance the damages beyond what they would be in other cases, the injury being the same. This morning the question is what will tend to diminish the damages, the injury being the same.

Evidence in bar of action is always admissible. Evidence to refute that which is offered in aggravation of damages is admissible. Where oxemplary damages are claimed, the defendant may offer evidence tending to show the absence of malice, wilfullness, or gross negligence, and general matters may be proved in mitigation which tend to qualify or excusr the defendant's act though they may not be complete justification or defense.

We found in dealing with the question of aggravation the chief thing was the defendant's wealth and business standing, and occasionally the plaintiff's standing. We found that as a rule aggravation can only be had in actions of tort, and not in damages. The same holds true in mitigation of damages. Wherever there is opportunity for aggravation there is also opportunity for mitigation. Where the plaintiff may show that there was gross carelessness, malice, or wilfullness, the defendant may introduce evidence to the contrary.

Thus in an action for assault and battery the defendant may show in mitigation that the injury complained of was received while the defendant and plaintiff were contending by mutual consent. Or that the defendant sought the difficulty in order to lay the foundation for an action. Or that the defendant assaulted the plaintiff in sudden anger caused by the plaintiff's clear neglect of duty.

In an action for slander or libel the defendant may show that there was immediate provocation in the acts and declarations of the plaintiff.

For example, in a case of that nature, it was held that the defendant's slander or libel being caused by similar slander on the part of the plaintiff, that fact could be shown in mitigation.

The defendant may also show that the injury of which the plainitff complains was contributed to or aggravated by the plaintiff's own negligence or misconduct.

In a number of cases against railroad companies it was held that the plaintiff had violated the instructions of his physician and the fact that that had aggravated the injuries could be shown in mitigation.

But the contributing negligence of a third person for which the plaintiff is not responsible cannot relieve the defendant.

For example, in a personal injury case, the defendant sought to show by way of mitigation that the plaintiff had been negligently treated by his physician and that his negligence had aggravated the injury. The court held that that could not be shown in mitigation of damages. The court held that the defendant had put the plaintiff in such a position that he had to employ a physician and that the negligence of this third person could not mitigate the consequences so far as the defendant was concerned.

Nor does the fact that the plaintiff had procured insurance or indemnity against such loss relieve the defendant from full liability.

For example, in an action against a railroad company the defendant cannot mitigate damages by showing that the plaintiff had an accident ticket. That some third person has indemnified the plaintiff by a private contract is not anything which can be shown in mitigation. If the plaintiff has at his own expense procured indemnity for the same injury, that fact does not relieve the defendant from his full liability in case there had been no insurance.

Where exemplary damages are claimed, the defendant may show in mitigation that he acted in good faith upon the advice of reputed counsel to whom he had fully stated the facts.

That defense, on the ground of advice of counsel, is one frequently made use of. If the act is not an act of trespass and the plaintiff claims exemplary damages, the defendant may show that he consulted counsel, that he fully and fairly disclosed all the facts to some reputable counsel and that the counsel advised him that he could do as he had done and that the act was done in good faith. Sometimes this defense may reduce the exemplary damages, but not the actual injury. So far as exemplary damages are concerned, they may always be mitigated. But of course acting upon the advice of some man not

in good repute, or acting in bad faith, does not comply with the conditions.

The defendant may also show that since the cause of action arosehe has done, and the plaintiff has exacted something tending to reduce the injury, as that in an action of trover, the defendant has restored the property to the plaintiff who has accepted it.

In that action one of the most difficult questions in this whole field arises. There is not any douht that in an action for trover if the defendant has restored the property and the plaintiff has accepted it since tha action arose, that fact may be shown in mitigation of damages. In most cases that will bar all damages and will leave simply the costs for the defendant. But the peculiar matter is here: Is said "if the plaintiff has accepted the property." The question is whether the plaintiff is bound to accept the property. Some cases seem to hold that the defendant has a right to tender the property back, qualified only by this condition, that the property has not deteriorated while in his possession. Other cases, and I think the majority of cases, hold that even though the property has not been diminished in value, the plainitff has a full cause of action matured at the time of conversion and that he is not compelled to receive back the property. A good deal could be said in favor of the rule that if the property is taken back in good condition it should relieve the defendant for all actual injuries. But most cases, I think, would hold that the plainitff is not compelled to take back the property. But of course, if the plaintiff does not take back the property, he does to that extent mitigate the damages for the defendant. The question is whether he is obliged to take back the property. See the note in 24 Am. St. Rep. 808, which gives the best discussion of this subject, so far as I am aware.

It is the duty of the party injured, whether by breach of contract or by tort, to do what he reasonably can, and to avail himself of all the reasonable means to lessen the consequences of the injury, and if he fails todo so, he can recover damages for those injuries only which could not have been prevented.

I want to emphasize that rule, a rule which applies both in contract and in tort. It makes no difference how the plaintiff has been injured, the law imposes upon him always an absolute duty to do what he fairly and reasonably can under the circumstances to lessen and diminish the consequences of the wrongful act. It makes no difference that the plaintiff has put him into this position. The plaintiff cannot sit still and allow the consequences of the wrongful act to flow on without any attempt to himder them. He must get medical aid, abstain from

work, or do whatever else is necessary to diminish the consequences of the wrongful act. The law always imposes that duty upon him. The poor man is not supposed to do as much in this direction as the man of better means. If the plaintiff can avail himself of the best medical aid, he should do so, but if he cannot afford it, he should avail himself of what he can afford. In every case the plaintiff must avail himself of the means at hand to diminish the consequences of the wrongful act. I do not know of any other single rule which has such universal application. For an illustration in the contract field: A man has been disappointed in getting goods agreed to be sold. He cannot sit by and allow the consequences to flow on. If he can go out and buy the goods in the market, he should do so. If he can by the expenditure of time or money or labor or by abstaining from work lessen the consequences of the act, it is his imperative duty to do so.

XVIII. Excessive and Insufficient Damages. The specific question I have in mind is this: Suppose the plaintiff recovers more damages than he is entitled to. Suppose it appears that the damages are clearly excessive; or suppose it to appear that the jury has awarded clearly insufficient damages. Has the plaintiff any remedy? Now we have found in a great many cases that there are certain fixed rules by which to measure damages. In the case of a promissory note there can be no doubt as to the amount of damages. It is a mere mathematical computation. There can be no mistake. But in tort cases, of course, the damages are in the discretion of the jury.

Where the damages are capable of being determined by some fixed and definite rule, as in most cases of contract, and it is evident that the jury has ignored the rule by awarding damages either excessive or insufficient, the court will set the verdict aside, or correct it of its own motion.

For example, if I make default in payment of a note of $100 with interest at 7% and the jury gives a verdict for $103, the court may set aside that verdict and instruct the clerk to correct the award. The court must set aside the verdict because the jury has violated the rule in determining the award.

Where, however, the amount to be awarded, as in most cases of tort, rests in the sound discretion of the jury the court will not set the verdict aside as excessive or insufficient, unless it appears in arriving at their conclusion the jury had been guilty of clear error or had been influenced by passion, prejudice or corruption.

In most cases of tort and in some cases of contract the damages rest in the discretion of the jury. Take the case

of personal injury. There is no fixed standard to determine what shall be awarded. If elements of gross negligence appear, there is room for exemplary damages. The amount may be large or small according to the sound discretion of the jury. The matter rests in the sound discretion of the jury, and if they have used their sound discretion, the court has no ability to interfere. I may say that in these cases there is hardly a question which is not appealed from on the ground of excessive damages or too small damages.

I think Kentucky is the only state where the courts have attempted to set a fixed limit to the damages that may be recovered. I think they have attempted to set the limit at $10,000. I think that I remarked to you that in some states the damages for causing the death of persons was fixed at $5,000. But except Kentucky I think no state has attempted to set a limit.

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CORPORATIONS.

I. The general idea of a corporation.

1. Definitions:- A person, - "a corporation is an artificial being invisible, intangible, and existing only in contemplation of law", - Chief Justice Marshall.

A collection of persons, - a corporation is a "collection of many individuals united into one body, under a special denomination, having perpetual succession in an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual", - Kyd.

A franchise, - "A corporation is a franchise possessed by one or more individuals, who subsist as a body politic, under a special denomination and are vested by the policy of the law, with the capacity of perpetual succession and of acting in several respects, however numerous the association may be , as a single individual", - Kent.

2. Theories of the corporate personality: There are three of these, viz:-

(a) The fiction theory, i. e., that the corporate personality is not real but artificial only: "The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought is itself a fiction, and has been appropriately described as a figure of speech", - Judge Finch.

This is the currently accepted American view, and is, specially insisted upon by Mr. Morawetz and Mr. Taylor.

(b) The organic theory: This is the German doctrine. This view that the corporation has a personality as real as that of the state; that in law a person is anything that is a distinct subject of rights and liabilities. "Juristic persons are no more fictitious than, say the conception of ownership is fictitious. In the eye of the law they are in the fullest sense persons, that is, subjects of legal rights and duties, and to that extent "real", as far as modern law is concerned". Salm.

(c) Representative theory: This is advocated by Dr. Ernst Freund of Chicago University; it is to this effect:- The rights held by a corporation are not the rights of any physical person, but those of the corporation as a distinct person in the law; the act of the majority is accepted as the act of all and those who act bind those who are silent; in other words, the majority vote of the quorum is the representative of all, and this is true whether the vote has been A to K, or B to Y in a corporation composed of A to Z . Any group that is the majority of a quorum is the representative of the corporation and is no unreal thing; the will of this representative body duly expressed is the corporate will, whether it be knowledge, ignorance, error, good, or bad faith, or wrong doing, or commendable action. This makes up the unity of the corporation, which it is convenient, if not entirely necessary, to treat as a person in the law.

3. Theory of the franchise: "A franchise is a right, privilege, or power of public concern which ought not to be exercised by private individuals at their mere will or pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. x x x No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise". Justice Bradley, 127 U. S. 1, on 40.

The state in its political capacity is the holder of all franchises, in trust for the public welfare; and when it makes a grant of any part of such franchise, it does not lose its public character but is yet to be exercised in advancing the public welfare; this is an essential, though implied, condition of the grant; if not performed, the state can resume the grant as for a condition broken.

The right to be and act as a corporation, mainly based upon historical reasons, is considered, and wisely so, as a right or privilege of public concern. This is true even though the business to be done is of a private nature, such as refining sugar or oil. The business is neither more nor less public than if done by individuals in their private capacity, but the privilege consists in bringing into existence and using in the business the valuable, efficient, impersoned, and in many ways less responsible agency known as the corporation; this is the matter of public concern, which is the essence of the corporate franchise.

The corporate franchises are frequently said to be primary and secondary: The primary franchise is the privilege to be, exist, and act as a corporation; the secondary franchises are such other franchises or special privileges, like the right to take property by eminent domain, as may be conferred upon the corporation, just as they might be upon natural persons.

4. When a corporation is considered as a person:- For most purposes it is so considered, and especially,

(1) As having rights of property and reputation protected at common law, and under constitutional provisions very much as natural persons.

(2) As having duties, arising both from its charter provisions, and fixed upon it by the common law.

(3) Statutes, conferring rights, or placing obligations upon persons, generally include corporations, though not specially named. Corporations, however, are not citizens entitled to all the privileges of citizens in the several states under the U. S. Constitution; they are citizens, however, within the law giving U. S. courts jurisdiction in suits between citizens of different states.

(4) In the ownership of its property, a corporation is considered as a person, - it owns its property, and its members do not own its property. If the property is to be conveyed or recovered, it must be done in the corporate name, and not in that of the members. Suits must be brought by and against it in the

corporate name.

5. When a corporation is considered as a collection of persons:
(1) In the management, - the majority controls.
(2) When justice requires, the corporate personality will be ignored, and the rights and duties of the members composing it considered: This appears usually:-
(a) In matters relating to changing the constitution.
(b) In determining the rights of members among themselves in equity.
(c) When corporate sins result from the concerted but apparently individual acts of members.
(d) When the corporate organization is used as a cloak to aid in commission of fraud.

6. When a corporation is considered as a franchise:
It is considered as a primary franchise mainly in its relation to the state, and particularly:-
(1) In the methods by which the state retains control over it, - by the writs of scire facias or quo warranto.
(2) In its incapacity to alienate its franchise, without consent of the state.
These two are based on the doctrine that the franchise to be a corporation is granted upon the implied condition that the grantees will faithfully carry out the purposes for which it was formed.
(3) In the power of the state to tax corporations, the franchise may be considered property.
(4) In the state's incapacity to change the charter without consent of members.
(5) In the limit on the power of the majority to change the constitution of the corporation without the consent of all the members.
These last three are based on the doctrine that a franchise, once granted and accepted, is a vested estate or interest in the members, of which they cannot be deprived without their consent.

7. Corporation and partnership: These differ:-

(1) In origin, - the idea of corporations is traceable to the public law of Rome; the idea of partnership is traceable to the customs of merchants in England and on the Continent and back to Roamn traders.
(2) In creation, - corporation only by express authority of state; partnership, by mere contract of parties.
(3) In franchise, - a corporation has at least one, a partnership, none.
(4) In management, - a corporation is manged only through the duly appointed officers and agents; in partnerships each partner or member can act for partnership.
(5) In powers,- the corporation can lawfully exercise

no powers except those expressly conferred or necessarily implied from those granted; cannot be enlarged except by state's consent, the members of a partnership may do anything lawful that they agree to.

(6) In duration, - the corporation is perpetual unless expressly limited; the death, resignation, or insolvency of members does not dissolve; but either of these dissolve a partnership.

(7) In ownership of property, - the title to the corporate property is in the corporation; that of the partnership in the members of the partnership; they are all considered part owners.

(8) In litigation,- corporation sues or is sued in its corporate name; the partnership in the name of its members.

(9) In the transfer of interest, - transfer of interest by member has no effect on corporate existence; that dissolves a partnership.

(10) In liability of members, - in the absence of statute, member of corporation is not liable beyond the amount of his shares; but in partnership, there is an individual liability to the extent of the debts.

(11) In dissolution,- corporation can be rightly dissolved only by or with the consent of the state; partners may dissolve at any time.

(12) In theory of existence,- A corporation is a legal entity; a partnership is not so considered in law, except in certain cases.

8. Corporations and Joint Stock Companies:-A joint stock company is sometimes said to be a "partnership, with many of the powers of a corporation." It is an evolution of partnership law; some of the incidents of partnership, such as non-transferability of shares, or authority of a partner to bind all the others, is excluded by the contract or statute under which it is formed. While it can be formed, as between the members themselves or the members and those who deal with it with full knowledge, merely by contract, such formation without express authority does not exclude the partnership liability to those who have no knowledge of the facts. All presumptions are in favor of the partnership liability and can be excluded only by express statutory provision or actual knowledge of party. They are usually authorized by statute, with transferable shares, and managed by a board of directors.

The presumptions of corporation law are exactly the reverse,- there is no individual liability here unless expressly created by statute. They have no franchise and are not considered as legal entities like corporations.

9. Corporation and fraternity, or stock exchange:An unincorporated society resembles a partnership more nearly than a corporation; they are not legal entities, and hence those who claim to be agents of such an institution bind only themselves and those who authorize them to act. The members are not

authorized to act for one another as in partnerships.

10. Corporations and cost-book mining companies. By custom of miners, there has grown up an unincorporated association that is quite like a joint stock company, in which the shares are transferable without affecting the continued existence of the association; only those especially appointed have authority to bind others. Otherwise partnership rules apply.

11. Syndicates: These are in fact temporary partnerships organized for a partivular transaction, such as to purchase or subscribe for a large amount of stock in a corporation to be formed, so as to insure the completion of the proposed skeme. As soon as the special transaction is completed, the syndicate is terminated. They are substantially partnerships.

12. Corporations and state institutions: There are in many states state universities, asylums, penitentiaries, managed by boards created by law, and appointed by the governor or elected by electors. These are frequently called corporations of a public kind; and other states they are not so considered, although they have some corporate powers. They are, in such states, called state institutions, and are subject to modification at the state's will without violation of the constitutional prohibition against impairing obligation of contracts.

13. Tests of corporate existence: Many times it is difficult to tell whether a particular institution is a corporation or not. The following tests have been suggested:-

(1) Merger of the individuals composing the corporate body into one distinct artificial individual existence.

(2) Legislative intent, - if this can be clearly ascertained it will be controlling in the creating state but not necessarily elsewhere.

(3) The powers conferred, as to have perpetual succession under a special name, and in an artificial form; to take and grant property, contract, sue, and be sued in this name; and to receive other grants and privileges.

(4) In foreign jurisdictions, the powers conferred, rather than the legislative declaration will control.

14. Classes of corporations:- The basis of classification may be:

(1) As to number of members,- aggregate and sole; an aggregate corporation is one in which there is capacity to have more than one member at a time. In a sole corporation, there is capacity to have only one member at a time.

(2) As to purpose, - they are ecclesiastical (or religious), and lay; which latter are eleemosynary and civil.

An ecclesiastical corporation was one composed of spiritual persons clothed with a spiritual jurisdiction and

subject to control by the church authorities. They do not exist in this country, for the state cannot confer ecclesastical jurisdiction, for it has none. Religious corporations are, with us, corporations of a civil kind, formed to manage the temporalities of a church. All other than . . ecclesiastical were, lay corporations, organized for various secular purposes; they were divided into eleemosynary,- formed to distribute the alms or bounty of their founder, -and civil, which were for any other lay purpose.

(3) As to completeness of corporate existence: Corporations are said to be pure and perfect,- those that have all powers of self management incident to corporations at common law,- and quasi or imperfect, having only part of the powers incident to corporations at common law; a municipal corporation is an illustration of the first, and a county or township of the latter.

(4) As to their relation to the state: Corporations are (a) Public,- formed for a governmental purpose; as a municipal corporation; (b) Quasi-public, one that is really a private corporation, but charged with the performance of some specially public function, like a railroad company; (c) Private, - those formed for the private benefit of the members themselves, as a manufacturing company.

(5) As to method of acquiring membership: Corporations are non-stock, in which membership is acquired by election or complying with the corporate constitution or by-laws; and stock-corporations, wherein membership is acquired by the complete ownership of the shares.

(6) As to validity of corporate existence: Corporations are (a) De jure,- one whose rights to exercise corporate powers is invulnerable, if assaile by the state in quo warranto proceedings; (b) De facto,- one whose existence is invulnerable against any one but the state, in a direct quo warranto proceedings; (c) By estoppel,- one who has no legal existence except as against some one who is estopped from raising the question.

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CREATION OF CORPORATIONS.

15. In general, a corporation is created through the joint act of the state and individuals, usually designated incorporators or promoters; these apply to the state for the privilege of becoming incorporated themselves, or of creating a corporation out of other individuals, or a group or association of other individuals or corporations. After permission is given these promoters organize or provide for the organization of the corporation; their functions then cease, the members or subscribers contribute the capital, elect directors and officers and take general control of corporate affairs; the directors and officers start and keep in operation the ordinary powers of the corporation.

A. The State's Functions.

16. The State's power to create: The power to create a corporation is an incident of sovereignty, and so does not have to be conferred by Constitutional provision. So, too, the sovereign's consent is essential,--no other power can rightfully create a corporation. None but the sovereign can create and none but the sovereign that creates can take away the franchise to be a corporation.

17. Evidence of the Sovereign's Consent: These are mainly four: (1) By King's Charter; (2) By Common Law; (3) By prescription, and (4) By legislative act. Lord Coke long ago said the essence of incorporation are: 1. Persons to be incorporated; 2. A name by which they are incorporated; 3. Of a certain place; 4. By sufficient words,--and although 'incorporate', 'found,' 'erect,' or 'create,' are generally used they are not essential; any words indicating an intention to create are sufficient.

18. By King's Charter: In England , by the common law, this was the usual way; the power still exists in the king, and is sometimes exercised, particularly in creating corporations for establishing colonies. In England the power is usually exercised through Act of Parliament to which the king's consent is essential. The king, however, cannot create a corporation with power ofimprisonment, give it a monopoly, or jurisdiction contrary to the common law. Private business corporations are

now organized under the general law called the Companie's Act of 1832, and amended since; Public service companies require a special act of Parliament, and are incorporated only after investigation and report of their necessity.

18. Creation Common Law: The State, and the Nation, in their organized capacity, are corporations; so, also, the king, the bishop, or parson (in the English Church), or executivofficers generally, in their official capacity, are considered corporations sole. They are not incorporated, in the ordinary sense, but the Common law holds these to be corporations, so far as necessary to enable their functions to be performed without break, in case of death or removal; the office or state endures though the officers die,--or as the common law maxim was "the king never dies."

19. Corporate existence by prescription: At common law when a corporation could show that it had exercised corporate powers for a long period of time, its right to be a corporation could not be questioned by any one but the state of king; the common law indulged the presumption that the proper charter had once been granted but through the lapse or accidents of time had been lost; its right to exist was then said to be by prescription; with us, in the case of public corporations, the same presumptions are made; but it has been said that they will not be made in case of private corporations.

20. Creation by legislative act: In England, the king, as supreme executive, was the holder of all the franchises of the Commonwealth, and hence his consent was essential to the creation of any corporation; with us the legislative bodies, are the custodians of the states franchises, and hence no corporation can be created without legislative consent. Such power inheres in our general legislative bodies, and is exclusive, and plenary as to time, place, method, and purpose, unless limited by Constitutional, or by the nature of legislative power, or a franchise.

21. Form in which the legislative authority is exercised: These are, when constitutions do not prevent, (1) By special act; (2) By general act; (3) By implication; (4) By Consolidation.

22. By special act: Until about 1840, this was the usual method in the United States, and to a great extent in England; the special act was usually enacted at the suggestion or through the

influence (good or bad) of those who wished to become incorporated, and would have such powers and qualities as the whim or caprice of the promoters of the legislature dictated; corporations for like purposes had entirely unlike organizations and powers; the special act was enrolled, as a law, and proved by a duly exemplified copy.

23. By general act: It is possible that such a method was in use at Rome; the first general law in use in England was in the time of Coke, allowing the erection of hospitals; it was not extended to other corporations. After the political views of the American and French revolutions, that all men were entitled to equal rights, became the motive power of political life, clamor was made for equal privileges in the formation of corporations; to meet this doctrine and to prevent the fraud and legislative jobbery incident to the grant of franchises by special act, general laws for creation of corporations, by complying with easy and simple requirements were enacted; as early as 1793, Pennsylvania made such a law as to churches; Massachusetts provided for manufacturing corporations in 1807; New York followed in 1811,--and in 1840 nearly every state had such provision for one, or all, class or classes of corporations. In 1843 Louisiana put in her Constitution that corporations shuld not be created by special act, but only under general laws, and the other states followed with similar provisions; so that now nearly every state has some provision of this kind in its constitution. It is usual, also, in these to reserve the right to the state to amend or repeal any of these provisions.

24. By implication: Where rights and powers are granted to an association of persons, and there is no mode by which such rights and powers can be enjoined or exercised without acting as a corporation, such an associations are by implication, held to be corporations to the extent necessary to make such rights and powers available.

25. By consolidation: The legislature by general law, (or special act, where constitutions do not forbid), may provide for the formation of one corporation out of two or more existing corporations. This is designated consolidation, or amalgamation.

26. Limits in legislative authority: These are such as arise (1) From nature of legislative authority; since legislatures with us are held to have delegated authority only, it is usually said they cannot redelegate their discretionary powers to others, and hence cannot delegate to any other body the general power

to create corporations; this power does not prevent the passing of a general law providing for the creation of corporations by complying with the terms indicated, and directing an executive officer to certify to the fact of compliance. A real exception, however, appears to exist, in the power of Congress to delegate to the territorial legislatures power to create corporations.

(2) From nature of franchise: By the common law an individual cannot have even a benefit thrust upon him without his consent, so the state cannot incorporate into a private corporation any person who does consent to be a member. Perhaps the rule is otherwise as to public corpor ations.

(3) From constitutional provisions,--and these are found in the (a) National Constitution.; or (b) State Constitutions.

27. Powers of Congress: The national constitution neither expressly authorizes or forbids the formation of corporations; but ever since Secretary Hamiltons report upon the National Bank, and the decision of McCulloch v. Maryland, 4 Wheat., 316, it is clear that Congress has the incidental power to creat any corporation that it deems necessary or convenient in carrying out any of its great substantive powers; it can create a bank, railroad, bridge, turnpike, telegraph, and such like corporations to be located and operated in any of the states either with or without the state's consent; it has also exercised the power to create a corporation for building a canal across the isthmus of Panama. Within the territories, or the District of Columbia, Congress has unlimited power to create corporations.

28. National restrictions on state legislatures: There are no express limitations, but there is the implied limitation that no state can create corporations and confer upon them such powers as would prevent the exercise of such exclusive or concurrent power as Congress has over the subject.

29. Powers of territorial legislatures: The power to create corporations inheres in such bodies, subject to control by Congress; Congress has provided that they can be formed only under general laws, which are subject to repeal or amendment by the territorial legislature or Congress.

30. State constitutional limitations: The most usual constitutional limitation is that the legislature shall pass "no special act creating corporations," or "conferring corporate powers," but they shall provide by general law for the creation of corporations, and all such laws shall be subject to amendment or

repeal. By the weight of authority creating corporations, and conferring corporate powers, are equivalent, though some cases hold that after corporation is once created under general law, other or special powers can be conferred upon it by special act. Such provisions do not prevent the classification of corporations upon some reasonable basis and provisions for the creation of these different classes with different powers and functions for each class. A law which relates to a class of persons or things is general, while a law relating to particular persons or things of a class is special. Other Constitutional provisions sometimes require that no law shall embrace more than one subject, and this shall be distinctly set forth in the title; others require laws for creation of corporations to receive a two-thirds or three-fourth vote of the legislature.

B. The Promoter's Functions.

31. Definition and Classes: A promoter is a person, by whatever name, who sets the machinery in motion, procures the subscriptions, directs the end, looks after the organization, prepares the prospectus, and negotiates the agreements, necessary in the formation and creation of a corporation. For convenience we may call them (1) Statutory, which may be divided into (a) Commissioners, under special acts, and (b) Incorporators under general laws; or (2) Self-constituted.

32. Commissioners: Under special acts it was usual to designate a part or all of the applicants, commissioners to open books, receive subscriptions to stock, distribute the stock, call a meeting for organization, and superintend sich meeting; their function then ceased; such functions were of a public discretionary character; they stood toward the corporation and subscribers as trustees. They, however, could subscribe themselves, and exercise their discretion in making allotment of shares if there was an over subscription.

33. Incorporators: Under general laws, a certain number of persons are required to sign and file articles of incorporation; they are called incorporators or corporators, and are usually directed or permitted to call for subscriptions to the stock, call an organization meeting of subscribers, act as inspectors of the first election, and certify who are elected, and appoint a time and place of the first directors meeting; their functions are about the same as Commissioners under special acts; they may or may not, as they choose, (at least under some statutes) subscribe for stock. Their functions cease as soon as the organization is complete.

34. Self constituted promoters: This allows others, besides commissioners or incorporators to take many of the steps preliminary to incorporation; any one who actively undertakes any necessary step is a promoter; he introduces the enterprise to aid, indicates possible profits, and the capital needed, and various other details. In recent years his functions have become important. Especially in organizing one corporation out of former existing corporations. The step he usually takes are: (1) Securing options on the stock or property of the companies to be combined; (2) Financiering the concern by securing the money necessary to complete the transaction, and furnish working capital; (3) Organize the new company. As soon as options are obtained, a proposition is made to some financial house to underwrite the stock (i. E., agree to take it if the public do not) of the new corporation, to the extent sufficient to furnish all the cash necessary for the transaction, for a commission usually to be paid in stock of the new company, As soon as such agreement is made, the promoter secured the fewest possible persons necessary to incorporate with least possible amount of stock, but with authority to increase the stock to the amount required. As soon as this small amount of stock is subscribed, the corporation is organized by the selection of the requisite officers; these thenincrease the stock to the amount necessary, authorize the issue of all of it to the promoter, who, in consideration therefore, agrees to have conveyances of all the property or stock of the corporations upon which he holds options to the new corporation ; by simultaneous transactions, these conveyances, duly executed, are delivered to the corporation, the promoter delivers the stock or cash to the old companies in payment, and delivers to the financial house, the stock which it was to receive as commissions; if any stock is left the promoter appropriates it as his fee for engineering the deal.

C. The Corporate Charter.

35. Its general nature: The conception of a corporation consists in the offer and acceptance of a charter wherein are set forth the terms and conditions upon which the state will permit an individual or association of individuals to exercise the franchise granted thereby. It is both a contract,--resulting from the offer and acceptance,--and a law, also, conferring the powers indicated; it is a contract the obligation of which cannot be impaired by either party to it without consent of the

other party; it is also a law, such as every person is supposed to know its contents under the maxim that "ignorance of the law excuses no one/" If general, the courts take judicial notice of it; if special, it usually must be pleaded and proved.

In its first instance, however, the charter or articles of association, is a license of authority for the persons named to convert themselves or other persons, or an association of others, into a corporation by organization, in compliance with the conditions indicated.

36. Offer and acceptance: The offer may be made by either the state to persons (as in the case in general laws), or by persons to the state (as usual in special agents), and the accpetance by the other party. Acceptance is essential, but need not be formal; it can be implied from acts, such as organizing and acting under it; to be valid as against the state which makes the offer (unless the law otherwise expressly provides) the acceptance must be within the state making it, by all to whom the offer was made. Renewals, extensions, and amendments must be accepted in the same way.

37. What makes up the charter: Under charter from the king, or special act of the legislature, the instrument or act itself makes up the charter, and usually sets forth in detail the name, powers, method of acquiring membership, management &c. Under general laws articles of incorporation or association are required to be entered into and filed with some public officer; the charter then consists of (1) the provisions of the general law, and (2) the articles of association, consistent with the general law.

38. Provisions of the general law: These enumerate the purpose or purposes for which corporations can be formed; contain provisions or restrictions as to number of incorporators, name, duration, amount of stock or debt, location of offices, number and qualification of directors and officers, liability of members, method of voting, notice of meetings, quorum &c. Also certain provisions as to the contents of the articles of incorporation.

39. Articles of incorporation: The general law usually requires that those who wish to incorporate (not less than a certain number of natural persons competent to contract), shall enter into written articles of incorporation, sign, and acknowledge the same, (as they would a deed), and file the same with some public officer, who is to record the same(if found to comply with the law), and furnish a certified copy thereof under the

seal of the state to the applicants; this copy so authenticated usually is made prima facie evidence of the existence of the corporation. The generally law usually requires these articles to set forth the name of the corporation, its purpose, location, duration, amount of stock, number of shares, officers, directors, and in some cases other matters. They must conform to the general laws, (inconsistent provisions are surplusage and void), and usually cannot, even though claimed, secure any powers except such as are expressly allowed by the general law; In New Jersey and Deleware, however, any powers may be created by the incorporators, if claimed in their articles of association, and not expressly forbidden by the general law. Under the first general incorporation law in England for the formation of hospitals, the corporation was created by a deed of settlement setting forth the organization in the deed endowing the charity. This is not usual in this country.

D. The Association.

40. Its necessity and nature: Since a corporation aggregate is composed of more than one person, the organization of which is not thrust upon any one, some association of a contractual character, necessarily precedes, accompanies, or results drom, the formation of a corporation; it need not be, though it usually is, a formal or written transaction, but sometimes it is very complex and intricate. Its general nature, however, is an aggreement by each associate with his fellows to organize for the purpose contemplated, and contribute his proportion of the funds agreed,--the consideration being the mutual promises of the parties.

41. Forms of association contracts: These are various, but may be classed as (1) An exclusively statutory contract; or (2) A common law agreement. These latter are: (a) An agreement to subscribe for stock in the corporation to be formed; (b) An agreement subscribing for stock in a corporation to be formed, or after it is formed; (c) Subscriptions to promoters, agents, or trustees; (d) Underwriting contracts; (e) Application, allotment and notice; (f) Conditional subscriptions.

42. Statutory contract : In some states where the statutes provide that articles of incorporation shall be filed, in which shall be stated the names of the incorporators, and the number of shares which each agrees to take,--all who wish to become members must subscribe for the stock in the articles of incorporation,--and no other method of subscribing will be valid.

This view however, seems to be confined to a few cases in New York, and Missouri under special statutes; the general rule in other states is otherwise.

43. An agreement to subscribe for stock in a corporation to be formed in the future, contemplates a subscription upon the books of the company after they are properly opened; the person does not by such an agreement, become a member,--nor can the corporation enforce the subscription.

44. Agreements subscribing for stock in a corporation to be formed: There is much conflict as to the legal effect of such an agreement, and at least four theories exist: (1) . That it is a mere offer, withdrawable at any time before the corporation is organized and accepts the offer; death or insanity revokes it, and any one may withdraw upon giving notice to the person who took the subscription. (2) That it is an offer until acted upon in accordance with the provisions and then becomes a binding contract. (3) That it is a binding contract from the time it is made. (4) That it is an offer to proposed corporation before its incorporation and acceptance, but a binding agreement between the subscribers from the time it is made. The first view probably has the weight of authority. If the subscription is made to the stock of the corporation already formed, which accepts the subscription, the contract is binding from the time of acceptance.

45. Subscription to promoter or trustee: If made to a statutory promoter, as a commissioner or incorporator, it is a binding contract from the time of making; if made to a self-constituted trustee, who is to organize the corporation, deliver the subsciption list to the corporation, and deliver certificates of stock to the subscribers, it is a binding contract between the promoter and subscribers; in accordance with its terms, from the time it is made; he has a right to enforce it, if he performs his part; and when it is delivered to the corporation and accepted by it, the corporation can enforce it.

46. Underwriting: This is a form of subscription entered into before subscriptions are called for from the public, whereby, for an agreed commission or profit, the underwriter undertakes to take all the shares except what the public subscribes for after the books are regularly opened and subscriptions called for.

47. Application, allotment and notice: Under the English law an

application for shares as made to the promoters, very similar to our subscriptions to stock in a corporation to be formed; after the subscription books are closed, the promoters make allotment, among those who have subscribed, either pro rata, or in such was as the promoters deem for the best interests of the corporation. After allotment is made, the subscriber must be notified of the number of shares alloted to him; the contract is not complete until then; before that time it is a mere withdrawable offer.

48. Conditional subscriptions: Subscriptions may be upon conditions (1) Express or implied; (2) precedent or subsequent; (3) or before or after incorporation; (4) or the delivery of the subscription may be conditional.

49. Express and implied conditions: Express conditions may be found either in the subscription or in the statutes relating to subscription; the former may be of infinite variety, if not inconsistent with the charter; the most usual condition found in statutes is that payment of a certain amount shall be made at the time the subscription is made; if such subscription is made before incorporation two views are taken as to the necessity of payment under such a statute,--one that it is necessary, and failure to pay makes the subscription void; the other (supported by the weight of authority), is that such provision is meant for the benefit of the corporation only, and it may waive it if it chooses.

The principal implied condition attaching to subscription at common law, is that no one can be called on to pay anything to the corporation for carrying on its business until, the whole amount of stock agreed upon is fully subscribed.

50. Conditional subscriptions prior to incorporation: If these are necessary for purposes of organization, two views are held: the New York view, that they are entirely void, and cannot be counted; and the Pennsylvania view which holds the condition to be void, and the subscription absolute, unconditional and valid,--so it may be counted as one of the necessary subscriptions. If such conditional subscriptions are not necessary for organization, in either states they would probably be held valid according to their terms.

51. Conditions precedent and subsequent: Subscriptions upon condition precedent is one which requires the condition to be performed,unless waived, before the subscribed can become a member; if made after incorporation two theories exist as to their legal effect; (1) That they are mere withdrawable offers until

the condition is fully performed; (2) That they are binding contracts from time of making, to await the time of performance, and subscriber cannot withdraw unless the corporation fails to perform.

Subscriptions upon conditions subsequent, are valid, and have the effect to make the subscriber a member from time of acceptance by the corporation; if the corporation fails to perform the condition, the subscriber cannot withdraw, but has an action for damages against the corporation for its failure. Courts construe conditional subscriptions to be conditions subsequent if possible.

52. Conditional delivery of subscriptions: Subscriptions, absolute in form, may be delivered to some to be delivered to the corporation only upon the happening of some event; if the delivery is made to some one unconnected with the corporation it does not become effective until delivery to, and acceptance by, the corporation; if delivered to an agent of the corporation one line of authorities holds that the legal effect is the same as if delivery to any outside party, while another line holds that it becomes absolute at once, and the condition is waived.

53. Fraud and mistake: These vitiate the subscription the same as in other contracts, and make it voidable at the option of the subscriber, He must, however, be diligent in discovering the fraud or mistake, and prompt in repudiating the subscription after ascertaining the fact. The English and some American cases hold that even if the subscriber has acted with due diligence, he cannot repudiate the subscription after insolvency and creditors rights have intervened; others hold he can if he is not guilty of laches.

54. Parties that may subscribe: The general rule is that subscribers must be persons capable of contracting so far as all subscriptions necessary for organization is concerned. An infant may subscribe, but if he does he may repudiate the subscription as in other contracts; at common law, the subscription of a married woman was said to be void, but under statutes in most states her subscription is now valid; an alien friend or non-resident, or person of any nationality or vocation may subscribe; neither private or public corporations can subscribe for shares unless specially authorized; in the absence of constitutional provisions forbidding the state or nation, by legislature permission, may subscribe for stock.

I. Organization.

55. Schemes of Organization: As before indicated, under a King's Charter, or special act, or deed of tsettlement, the organization was distinctly set forth in the instrument itself, and usually the persons who were to act as first officers were designated; methods of continuing the succession were also specifically provided. Under general corporation laws it is usual for the organization to be completed before the articles of incorporation are filed, by electing the proper officers and agents, who make certificate of the fact when the articles are filed with the public officer; in other cases after subscriptions have been received, the incorporators call the subscribers together and they elect officers, adopt by-laws, etc., and start the machinery running. In other states more formal proceedings are essential, such as having a hearing before a court or commission established for the purpose.

56. Proof of organization: Usually under general laws a certified copy of the articles of association filed with the secretary of state duly certifies by him under the great seal of the state is prima facie evidence of the existence of the corporation; it is not usually conclusive, and the facts of organization may be entered into. Under special Acts, the act itself, or an exemplified copy, with evidence of user was sufficient to establish corporate existence. General reputation has been held to be sufficient.

57. Commencement of corporate existence: As to the exact time of corporate birth there are divergent views, based more or less upon the peculiar provisions of the statutes. These are: (1) There is no corporate life until organization is complete; (2) Corporate life begins as soon as articles are filed with the proper officer without stock subscription or organization; (3) Only a qualified corporate existence begins when the articles are filed, and adult or perfect corporate capacity is not required until the stock is provided as required; (4) Corporate life begins as soon as articles are filed, but until the stock is divided into shares the incorporators are tenants in common of the proposed capital; (5) Under special acts the statute may make those named ipso facto e5 eo instanto a corporation without further act upon their part.

58. Conditions of de jure existence: A substantial (but not necessarily literal) compliance with all the mandatory conditions of the general law is essential to de jure existence,--that is such as will avail against the direct assault of the state.

The implied condition that there must be good faith is seeking corporate powers is mandatory; mandatory express conditions are (1) that there shall be a certain number of incorporators; (2) written articles of agreement; (3) giving the names and residents of subscribers of stock if that is required; (4) naming the place of business; (5) stating definitely the purpose or purposes; (6) subscribing articles of association; (7) acknowledging them; (8) filing them as required by law; all these have been held to be matters of which the state may complain if not substantially followed.

59. Conditions of de facto existence; Something less than a substantial compliance with all mandatory provisions will suffice for de facto existence, i. e., such as is valid as against any one but the state. These are: (1) A valid law under which such a corporation could be formed; (2) A bona fide attempt to organize under the law; (3) An apparent compliance therewith; and (4) corporate user. When these things occur, by the w eight of authority, no one but the state can successfully question the corporate existence.

60. Conditions of existance by estoppel: Persons who have acted as if a corporation was in existence, and in such a way as to recognize it to be such, and where it would be equitable to hold them to such recognition, and equitable not to do so, they will be estopped to deny such corporate existence, even though it is really neither de jure nor de facto. This is the rule by the weight of authority, and there are many cases to the contrary; a different view is that there can be no estoppel upon a matter of law, and hence if there is no law, or an unconstitutional law there can be no estoppel; another view is that it is against public policy to allow persons to claim corporate existence, unless they have substantially complied with a valid law,--hence there can be none merely by estoppel.

61. Parties estopped: Where existence by estoppel is recognized the parties estopped to deny its existence are: (1) The pretended corporation itself; (2) Those who act as or claim to be, members, either among themselves, or in regard to their liability upon their subscription or statutory liability to corporate creditors; (3) the promoters are officers of the apparent corporation; (4) Persons who have dealt with the apparent corporation in such a way as to recognize it to be such, either when they seek to avoid their liability to it, or to hold its members liable as partners; (5) Persons who have injured such corporation by their torts or crimes, when called to account by it.

62. Effect of failure to comply with conditions: (1) The state may complain for failure to substantially comply with any mandatory condition in quo warranto proceedings; if there is neither de jure, nor de facto existence, one not estopped for other reasons, can question the validity of the pretended corporate existence in any proceeding in which it is of any importance to him to have it determined. If there is de facto existence, except as against the state, the powers, rights, duties, and liabilities of the corporation and its members, are the same as if de jure; and where neither de jure nor de facto, as to one otherwise estopped by his own acts, the corporation is tohim as it would be if de jure. But to one not so estopped, he may treat the members (if it for a business purpose) as if they were partners, or at least hold them as members of an unincorporated association.

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THE BODY CORPORATE.

A. Members, integral parts, and organs of action.

63. Necessity of members. In a corporation aggregate there must be members, otherwise it cannot exist. If it is a non stock company, the death of all the members terminates the existence; but if it is a stock company the representatives of deceased members who succeed to the shares become members, and consequently the corporation is not dissolved. A practice has lately grown up whereby a corporation purchases and retires its own shares of stock. When that is done if all shares are so retired it would seem the corporation would be dissolved. No case, however, has been decided yet so holding.

64. Acquisition of membership. Membership in non-stock companies is obtained by complying with the conditions set forth in the constitution and by-laws. In stock corporations membership is acquired through ownership of stock and this may be (1) Subscription to the stock accepted by the corporation; or (2) by a completed transfer of shares; or (3) in some cases by estoppel, such as acting as a member without in fact having subscribed.

65. Integral parts. Sometimes one corporation is composed of two groups of individuals in such a way as that the continuance of both is essential to the continued corporate existence; if therefore from any cause all of one group should die, and there was no method of supplying their place the corporation would necessarily be dissolved. It was once contended that directors were such an integral part, but the cases have decided otherwise. It is not usual to find a corporation so created.

66. Organs of action. Since a corporation is an artificial entity it can act only through representatives. These are (1) The majority of a quorum of corporate members duly assembled in corporate meeting; (2) A majority of directors duly assembled in director's meeting; (3) Officers of the corporation who are considered parts of the organization or agents who are not part of the organization but represent it as any agent his principal; and (5) servants who do not represent it but simply work for it.

67. Qualification of agents and officers. Unless statute or charter prevents, a corporation may select any person it pleases to be its officers, agents or servants. It is usual to require

directors to be shareholders, and in some states they are required to be citizens of the United States.

68. Functions of shareholders and directors. Shareholders wield extraordinary and unusual power, such as electing directors, accepting and rejecting amendments, increasing and reducing capital stock, making by-laws, admitting members, and in some circumstances removing officers or restraining ultra vires transactions; or disposing of corporate property, winding up corporate business, or surrendering corporate franchises.

The directors control the ordinary business affairs, such as the policy of management; its expediency of acting or contracting, selecting inferior officers, fixing their compensation, directing their action etc. Within this scope of their authority, if they act in good faith the stock holders cannot dictate to them nor control their acts in any particular; the stock holders must wait until time for a new election for selecting such directors as will conform to their wishes.

69. Functions of other officers.

The President, merely as president presides over corporate meetings and has no greater power in managing the corporate business than any other share holder; but by statute or charter, or by-law, or by a course of action acquiesced in by all, he is usually given the power to represent the corporation in most of its ordinary business transactions. He usually executes conveyances, signs contracts and certificates of stock.

The Vice President performs the functions of the president when he is unable to perform his duties.

The Secretary keeps the minutes, records of corporate meetings, and has no other duties unless specifically conferred upon him. He is usually made the custodian of the corporate seal and required to affix and attest it to all documents executed by the corporation. He frequently is allow to issue shares, and is made the transfer agent of the corporation.

The Treasurer is custodian of the corporate funds and has power to endorse checks for collection by the corporation. He is sometimes said to have implied authority to draw checks or bills of exchange, or sign promissory notes for money borrowed by the corporation, but it is doubtful if he can do this without special authority.

B. Internal Relations.

70. Contracts contained in the charter. In 1769 the King of

England incorporated twelve persons by the name of Trustees of Dartmouth College, and granted to them and their successors the usual corporate powers, and also authority to fill up any vacancies which might be created in their own body. In 1816, the Legislature of New Hampshire attempted to amend the Charter by increasing the number of trustees to 21, the 9 additional members to be appointed by the Governor, and also by putting over the trustees a board of overseers with power to inspect and control the most important acts of the trustees. The corporation refused to accept the amendment, and the case was taken to the Supreme Court of the United States, where it was held that the charter constituted a contract between the King originally and after the revolution between New Hampshire and the corporation, which contract was one , the obligation of which could not be impaired by the State of New Hampshire without violating the national Constitutional provision, "That no state shall pass any law impairing the obligation of contracts." From this case,has grown up a great body of corporation law. Resulting from this decision it has been held that in the formation of a corporation there are: (1) A contract between the state and the corporation; (2) A contract between the state and corporate creditors, and between stock holders and corporate creditors, in the case of a special statutory liability; (3) A contract between the state and the corporators or members; (4) A contract between the corporation and the members, or among the members themselves as to the amount to be contributed, or that subscriptions are made in good faith. All these contracts, whether express or implied are protected by the constitutional provision.

C. CORPORATE FUNDS .

71. The General idea: By incorporation for business purposes there is a dedication of certain funds by the implied and express consent of the state and the corporators to the attainment of certain purposes in a certain way. Because the state believes the purposes desirable, it authorizes the peculiar method; because the corporators deem the method necessary or desirable and the purpose profitable, they contribute the funds; the peculiar method is by the state authorizing a changing body of persons through a specified form of organization and under a designated name to act and be considered as one person in whom are vested the funds and upon whom is placed the duty of applying them to the purposes named. These funds are designated capital or capital stock.

72. Capital and Capital stock. There is much confusion in the use of these terms. The best usage, however, is to say the capital of a corporation is the whole amount of itsproperty of whatever kind. And to say that capital stock is the amount which it has or is authorized to obtain by way of subscription. This latter is the sum fixed by the corporate charter as the amount paid in or to be paid in by the subscribers for the prosecution of the business and for the benefit of corporate creditors.

73. Purpose of capital stock. Corporations acting within the scope of corporate powers fix no liability on their officers or any one else; they charge only the corporation. Hence the purpose and policy of requiring a capital stock as security and indemnity of persons who become its creditors; the law making power confers upon them privileges,--a franchise,--a right to make contracts in its artificial name without fastening a liability on any natural person; and it exacts from them as a condition on which it grants this franchise that they place a capital stock in safe pledge for the security of their creditors. This is a permanent investment with no power in a shareholder to withdraw it until the corporation is wound up and all its debts paid, and with no power in the managing board to permit it to be withdrawn at the expense of creditors. It is looked upon as a trust fund for the benefit of the corporation and the protection of corporate creditors.

74. Capital stock and shares of stock: These are different things. The capital is the money or property or both of the corporation; the shareholder's shares are representative ofthe capital, the surplus, the franchises, and the good will. The capital stock of the company is owned and held by the company in its corporate character; the capital stock of the shareholders, they own and hold in different proportions as individuals; the one belongs to the corporation, the other to the corporators. While the nominal or par value of the cap ital stock and ofthe share stock are the same, the actual value is often widely different. The capital stock and surplus differ also. Neither the capital nor capital stock can be divided and distributed, but the surplus may be. So it may be said that property of a corporation consists in three things, which are its capital stock, its surplus, its franchise; but these three things, distinct in theownership of the company, are united in the ownership of the shareholders.

75. Shares of stock. Shares are of various kinds such as common, preferred, guaranteed, interest bearing, special, treasury, deferred, founder's shares, watered, fictitious, or spurious.

Common shares entitle their owners to an equal proportional particip ation in the management, profits, and assets in case of dissolution.

Preferred shares entitle owners to some preference in the distribution of profits, or of assets over the owners of the common stock. They may be either cumulative or non cumilative as to profits up to a certain fixed amount; if cumulative a deficiency in paying the profit for any one year must be made up out of the profits of succeeding years In the absence of preferred stock being expressly made cumulative it will be held nevertheless to be so. Preferred shareholders have a right to participate in the management and are subject to liabilities as other shareholders.

Guaranteed shares in the United States now mean substantially the same as cumulative preferred shares.

Interest bearing shares are such as bear interest upon all sums paid in until the corporation is completed and profits earned out of which to pay dividends. Such payment however, is held to be illegal as against creditors who might be injured thereby.

Special stock is a peculiar kind provided by law in Massachusetts limited to 2/5 the actual amount of capital, subject to redemption at a certain time drawing interest at a fixed rate, and without liability of the holder beyond the amount subscribed.

Treasury stock is that part of the authorized stock left in the possession of the corporation to be issued in the future by the corporation or upon further subscription. The term is also used to designate stock that has once been issued but surrendered or forfeited to the corporation, and afterward re-issued by it. It cannot be voted nor does it draw dividends.

Deferred stock draws no dividend until some other class of shares receive their dividends.

Founder's shares entitle the holder to all the profits after certain fixed maximum dividends are paid to theother shareholders.

Watered stock is that which upon its face purports to have been paid for at its full value, but which in fact has been issued without the corporation having the right to demand the full face value thereof.

Fictitious shares are substantially the same as watered shares.

Spurious stock is that issued in excess of the amount authorized. It is void and the holder does not become a member of the corporation.

76. Right to create a capital stock : The power to create, increase, or decrease, capital stock is a franchise which can be exercised only under the authority of the legislature. At the time a corporation is organized, however, it may provide for both common and preferred stock and call for subscriptions for either; if the corporation is first created and the stock subscribed upon the understanding that only common stock shall be issued, by the weight of authority the corporation cannot create shares that shall have a preference over the common shares. By express legislative authority, however, it has been held that the majority of members contrary to the wishes of the minority may issue preferred shares; it is said to be anologous to borrowing money, and the majority certainly have the right to do that if done in good faith.

77. Nature of shares of stock: A share of stock is an intangible property right to participate in the profits of the corporation and in the event of dissolution to participate in the division of assets after debts are pair. They are personal property, goods, wares or merchandise within the 17th Section of the Statute of Frauds, and choses in action. They are not negotiable instruments, and at common law could not be taken by attachment or on execution or in replevin, because of their incorporeal nature. They are usually considered as being located at the domicile of their owner, though the state may give them a situs at the domicile of the corporation. They are evidenced by a certificate which usually says "This is to certify that A. B. is the owner of Ten Shares of Capital Stock of X. Company of the par value of $100 each, fully paid up, and transferrable only upon the books of the corporation upon surrender of this certificate duly endorsed." This is usually signed by the president and countersigned by the secretary under the seal of the corporation. Upon the back is usually a form of assignment which will read "For value received, I hereby assign and transfer all my right title and interest to the shares in X. corporation, evidenced by this certificate to Y., and I do hereby appoint Z. to be my agent or attorney in fact for me and in my name to have the transfer of the same madeupon the books of the corporation." This will be signed by A. B. and delivered to Y. It is not necessary to fill in the name of

the purchaser nor the name of the attorney to make the transfer. These may be left blank and then after delivery of the certificate to Y. the purchaser, he may by more delivery of the certificate sell it to some one else and this to another, and so on; the last purchaser may fill in his own name and the name of any person to have the transfer made on the books of the company; he can then take the certificate to the corporation, surrender the certificate, have the transfer made to him upon the books, and receive a new certificate in his own name.

D. THE CORPORATE NAME.

78 Necessity of a name: It was said long ago that names of corporations are given of necessity, for the name is as the very being of the constitution, and though it is the will of the king that orects them, yet the name is the know of their combination, without which they could not perform their corporate acts. Such is the rule yet.

79. Acquisition of a name: A name is usually given in the charter or articles of association and the law now generally requires it to be so given; but it is not perhaps indispensable that it should be so given; it may be derived from usage. The corporation, perhaps, cannot select a name already in use by another corporation.

80. Rights in the caorporate name. If lawfully acquired the right to a corporate name is a franchise and one who has acquired a name has this same right to use itas it would a trade mark, and may enjoin its subsequent appropriation and use by another corporation, association or person, if it would be damaged thereby. It has been held, however, that a foreign corporation cannot prevent the use of a corporate name afterwards selected by a domestic corporation; and no exclusive right can be acquired in geographical names. The secretary of state or the proper registoring officer has discretionary power to refuse to register a company that chooses a name that closely resembles one already in use.

81. Effect of Misnomer. In the case of contracts this has no effect if the identity of the corporation can be established. In process against the corporation by the wrong name a suit is not validly begun but it may be corrected by amendment; if the corporation issued process for itself in a wrong name it is ground for plea in abatement; slight variation, not misleading as to the identity of a corporation is not usually material.

82. Change of name. The corporate name can be changed only by consent of the state and of the shareholders. Such change if legal does effect the rights, duties, or liabilities of the corporation. It has been held,,however, if the change is illegal, members consenting thereto are liable as partners afterwards.

E. THE CORPORATE LIFE.

83. Perpetual succession : In the absence of any provisbon to the contrary the duration of a corporation is perpetual. It is usual by constitutional or statutory provisions to fix a limit to the corporate life. Some statutes require a limit to be fixed in the articles of association. Within the time fixed, however, the corporation is said to have perpetual succession by which is meant the power to provide other members in the place of those who drop out. In the case of non stock corporations, this is usually done by the election of other members; in stock corporations the successor in the ownership of stock becomes a member.

84. Mode of action, share holders meeting. So far as the members control corporate action they must do so in a duly called corporate meeting. This meeting must be called by the proper officers; in the absence of other provisions, the directors have this authority; it is usual to put such authority in the hands of the president or secretary. Regular meetings of share holders are also usually provided for in the by-laws, the time and place being designated there.

85. Notice of shareholders meeting: At common law notice of corporate meetings, definite as to day, hour,and place, was necessary to be given personally to each share holder in order to make the meeting valid; and in the absence of charter, by-laws or statutory provision, this is still the rule; the rather however is usually regulated by the charter or by-laws; these usually allow notice notice to be given by publication, or through the mail. If the meeting was a special one, or the business to be done extraordinary, the notice must state what the business to be done is. No further notice is necessary of an adjourned meeting, or the business to be done thereat than the record of the resolution adjourning the meeting, after the time and place is fixed.

86. Quorum: At common law if all of an indefinite number of share holders are duly notified to meet, those who assemble constitute

a quorum; but charter, by-law, or statutory provisions now usually require a majority of the shares outstanding to constitute a quorum. It has been held that members may vote by proxy and in such a case it seems that one member holding the proxy of enough shareholders to make a mojority of the shares may by himself hold a corporate meeting and elect the officers, provided the meeting was duly called. This is frequently done by corporations organized in New Jersey.

87. Place of meeting: In order to make a valid meeting against share holders who do not attend, the meeting must be held within the state creating the corporation; those who do attend will be estopped from denying the validity of the action taken. A corporation formed by the consolidation of two corporations created in different states may hold a shareholders meeting in either state.

88. Directors meeting: The directors must also act in a duly called meeting; they have no authority to bind the corporation by their individual acts done outside the corporate meeting. The rules as to notice of meeting are the same as in the case of share holders. In the absence of a provision to the contrary, the quorum of the director's meeting is a mojority of directors. They vote as individuals and not according to shares, and cannot vote by proxy. Being agents of the corporation there is no necessity to meet within the state as in the case of share holders. Exercising delegated power themselves it is usual to say that they cannot, without special authority delegate their discretionary duties to an executive committee: There are many cases, however, to the contrary.

89. Execution of contracts: The contracts of a corporation should be made in the corporate name. Convenances of land should be to the corporation in its corporate name; so too, the convenance by the corporation should purport to be granted and executed by the corporation in its corporate name. So also, notes by the corporation should be signed by the corporate name and notes payable to the corporation should be made to it in its corporate name.

F. DISSOLUTION OF CORPORATIONS.

90. Methods of dissolution; A corporation may be dissolved (1) By expiration of the time mentioned in the charter; (2) By the happening of a condition or contingency prescribed by the charter to have that effect; (3) By both of all the members in the

case of non stock corporations; but in the case of a stock corporation the shares of the deceased members are distributed as personal property, and consequently the successor in ownership becomes a member and the corporate life is not affected; (4) By loss of integral part (in case of corporations consisting of integral parts) without the power to replace such integral part; (5) By a surrender of the franchise, accepted by the state. It is said that acceptance by the state is essential to the dissolution; this is usually now provided for by general law prescribing a method whereby this may be done. Mere non-user or insolvency of the corporationis not alone a dissolution. (6) By repeal of the corporate charter by the legislature when the state has reserved such power; (7) By forfeiture of the corporate franchise by a proceeding in the courts for that purpose, because of non-user or misuser of the franchise granted.

91. One man companies. In the case of stock corporations there is usually nothing to prevent one member from acquiring all the shares of stock. By the weight of authority, if the corporation was validly created the fact that one person acquires all the stock in good faith has no legal effect upon the continued corporate existence; acting in the corporate name and through the corporate officers the action taken is corporate action. And on the other hand the individual acts of the sole owner does not bind the corporation; though the individual owner might himself be estopped to deny that such action was in effect corporate action. In Maryland and Kentucky, it has been held that the owner ship of stock by one person virtually suspends corporate existence during such sole ownership.

92. Effect of dissolution. (1) Franchises can be no longer exercised; (2) As to executory contracts; involuntary dissolution at common law extinguished such contracts, and no damages could be recovered for non performance. In equity and by statute in most states the obligation of such contracts survives, and may be enforced against the corporate assets, and it is said that voluntary dissolution does not extinguish such contracts; (3) As to debts; at common law debts due to or from the corporation were extinguished; but now such claims are preserved in equity and generaly by statute; (4) As to personal property at common law this upon dissolution vested in the crown or state; but now it is preserved as an asset for the payment of creditors or distribution after creditors are paid among share holders. (5) As to real property: This at common law reverted to the grantor; but now a corporation whose duration is limited may

take or grant an estate in fee; and upon dissolution all land then belonging to the corporation become assets for the payment of debts and distribution among share holders, there being no reversion either to the grantor or to the state in the case of private business corporations.

In eleemosynary and non business corporations the common law doctrines of the escheating of personal property to the state and reversion of real property to the grantor are applied. (6) As to actions by a corporation; suits by a corporation at common law abate upon its dissolution, but statutes usually now prevent such a result by allowing the representative of the defunct corporation to continue the suit in its place. At common law no valid judgment could be rendered against a dissolved corporation and attachment and garnishment proceedings were terminated by a dissolution. Statutes now usually provide that dissolution shall not abate pending suits nor prevent the bringing of suits against the defunct corporation. Upon dissolution either by voluntary surrender of the charter, by repeal, or by forfeiture, statutes usually provide either that the corporation itself shall continue to exist for a certain time in order to wind up its affairs; or a receiver shall be appointed for such purpose.

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CORPORATE POWERS AND LIABILITIES.

A. Powers in General.

93. Theories of corporate capacity: There are two of these : (1) Special capacities; (2) General capacity. The doctrine of special capacities is that corporations have such powers and only such as are expressly granted or necessarily implied from those granted; all others are excluded. The doctrine of general capacity is, that a corporation once duly created has all the powers and capacities of a natural person so far as they can be exercised by an artificial person. While the rule of special capacities is almost universally adhered to in this country there is a tendency in the decisions of the state courts where no public interest or policy is specially involved and creditors rights are not affected, practically to allow a general capacity to do everything in every way an individual could do, within the field covered by a business in which the corporation was organized to engage.

B. Classes of Corporate powers.

94. Corporate powers are of three classes: (1) Incidental; (2) Express; (3) Implied. The incidental powers are such as are annexed tacitly without any express words to any corporation duly created. They include (1) The power to have perpetual succession for the period designated; (2) To have a corporate name and to contract, grant, receive, sue, and be sued therein. (3) To purchase and hold personal and real property necessary. (4) To have and use a seal. (5) To make by-laws. (6) To remove members or officers under some circumstances.

Express powers are such as are specifically enumerated in the charter or general law, and constitutionally granted therein, together with such as are lawfully inserted in the articles of incorporation.

Implied powers are such as are reasonably necessary or proper for the execution of the powers expressly granted, and not expressly or impliedly excluded. In this connection, necessary ,does not mean indispensable, but does include that which is convenient and usual in carrying out the express powers.

95. Rules of construing corporate charters. The legislative intention is to be ascertained if possible, and given full intent; the language is to be construed neither strictly nor liberally but according to its fair import; words are to be given their ordinary meaning unless custom or usage has given

them a different one; the whole law is to be considered; but the enumeration of certain powers, by implication, excludes all other unnecessary power.

When the question is one between the state and the corporation, or when thepublic interest is involved a strict construction against the corporation and in favor of the state will be applied; and if the charter is silent about a power it does not exist; if the language is susceptible of two meanings, that construction is to be adopted which works least harm to the state.

C. Particular Powers.

96. Power to contract. In general, in order to determine the validity of a corporate contract, three things are essential: (1) Did the corporation have power to make it; (2) Was it made by an authorized agent; (3) Was it made in the proper form.

The first is a question of the subject matter, the second one of agent's authority, and the third one of form. These will be taken up in order.

97. Power to contract debts and borrow money. A corporation may contract debt to any extent for its corporate purposes that its credit will allow, unless statutes forbid. Statutes frequently fix the limit as to the amount that may be borrowed and in such case one who has loaned money to the corporation in excess of the limit can not recover the excess; but one who in good faith loans money after the corporation had already borrowed up to the limit can recover if he had no knowledge of the fact. It has been held that a corporation cannot borrow money for the purpose of purchasing its own shares.

98. Power to issue negotiable instruments. Whenever it is a necessary or convenient method of conducting their proper business corporations through agents having express or implied authority to bind the corporation have thepower to issue any form of negotiable instruments; but they have no power unless expressly authorized to deal in notes or bonds. If a corporation has power to issue a promissory note for any purpose a bona fide holder for value, having no knowledge of want of authority of the agent or of other irregularily or that it was issued for an untra vires purpose,will be protected.

99. Power to issue accomodation paper. There is no implied power to issue or indorse negotiable instruments for the mere accomodation of an outside party; but if it is done by a corporation

having authority to issue promissory notes, a bona fide purchaser without knowledge of the fact will be protected.

100. Power to be surety or guarantor. There is no such implied power; though it has been held that if all the shareholders agree, and bona fide creditor's rights are affected the guaranty will be binding. There are also well defined exceptions to the general rule: e. g., a corporation holding the securities of another party has the right to dispose of them and guarantee their payment in the ordinary course of business; so also a railway company may guarantee the payment of the bonds and interest of a company whose road it is authorized to lease.

101. Power to form partnerships. The general rule is that a corporation has no such power unless expressly authorized; the reason being that it would necessarily give to some one outside of the corporation, i. e., the other partner a power of management over the corporation, which would be inconsistent with its duty to the state. Of course, the corporation may be expressly authorized to enter into a partnership, and in California it has held that if the management was left entirely to the corporation it might be a partner.

102. Power to enter into trade combinations. In regard to pools between connecting lines of railroad where a division of earnings is made for through traffic, if the rates established are not unreasonable, such transactions are valid; if between competing lines, and for the purpose of preventing competition, they are prima facie invalid; however, in England and New Hampshire they have been held valid if the rates agreed upon were not unreasonable. The United States Anti Trust Act of 1890, forbids pooling between competing lines whether the rates fixed are reasonable or unreasonable.

Other trade combinations which restrain trade and competition, or which restrain a corporation from controlling itself through the officers provided int he organization of the company are void, for two reasons: (1) All contracts in restraint of trade, with exceptions, are void and uninforceable whether between individuals, partnerships, or corporations; and (2) Because corporate authority is a franchise granted by the state for a definite purpose to be exercised in the way proscribed and subject to forfeiture by the state if it is not carried out in accordance with the grant; if therefore the corporation abdicates its power to manage itself, the state by quo warranto proceedings may take away its charter for becoming

a member of such combination. Such contracts at common law were not criminal or tortious, but merely uninforceble. The national as to in terstate and foreign commerce, and most of the states, have by their anti-trust acts made such combinations borth tortious and criminal, so that those who may become members are subject to a penalty in favor of the state, and liable for damages for one injured thereby.

103. Unincorporated trusts. The original form of a trust combination was for the shareholders of a corporation to place their shares in the hands of trustees to be voted by them and receive from them trust certificates instead; the duties of the trustees in a general way, were state in a deed of trust, enabling the trustees through their ownership of the stock and power to vote it, to control all of the corporations whose shareholders had so placed their stock in trust. Such a transaction, when for the purpose of creating a monopdly has been held illegal and void.

104. Incorporated trusts. Much the sare result is obtained by one corporation purchasing the shares of other corporations, and issuing its own shares in payment thereof. This enables the shareholders of any number of corporations in effect to combine their interests in such a way as to confer the sole power of management of all of them in the hands of one corporation. In Illinois where corporations may be formed for any lawful purpose, it was held that a corporation formed for a purpose of this kind, which practically resulted in a monopoly of the gas business of Chicago was illegal and void, and could be dissolved by the state, although apparently there was a perfedt compliance with the provisions of the law. New Jersey, on the other hand holds that courts have no authority to declare such a corporation illegal, so long as the state legislature has not expressly made them illegal.

105. Power to consolidate. Consolidation is a merger, union, or amalgamation, by which the stock of two or more corporations is made one, their property and franchises combined into one, their names merged, and their powers combined, so that practically one new corporation results. Consent of the state and consent of the shareholders are essential to any consolidation. By the weight of authority under a reserved power to alter or amend the charter the majority of members may consent to a consolidation against the wishes of the minority; if the state has not reserved the power to amend,

unanimous consent of members is essential.

By consolidation the old companies are usually dissolved, their property becomes that of the new company, but their liabilities continue against the old companies, although they are usually enforceable against the new company; lands vest by virtue of consolidation in the new company without further conveyance; and generally contract rights of the old companies pass to the new, and it must perform the contract duties of the old; the new company is liable for the debts of the old companies to the extent of property received, and if expressly assumed, to their full extent; they are usually held liable for the torts of the old companies. In inter state consolidation the new company is a new company existing in each state with the powers, rights, and franchises that the constituent company in that state had, but not those that belonged to the companies created in another state.

106. Power to hold and acquire real property. At common law it has been said a corporation had this power to an unlimited extent, but in this country it is generally held that corporations have the right to purchase and hold only such as is necessary or convenient to carry out their legitimate purposes. If a conveyance of real estate to the corporation is executed none but the state can afterwards complain; and it can only in a quo warranto proceeding to forfeit the corporate charter, unless some statute authorizes the conveyance to be set aside, or the land escheated to the state. If the conveyance is not completed an interested party may object in any suit by the corporation to perfect its title; and a court of equity will not decree a specific performance of a contract to convey land which a corporation has no authority to hold. A corporation may take any estate in land except an estate in joint tenancy, or such as dower, courtesy, or tenance in tail, etc. A grant of a free hold without words of inheritance or succession will pass a fee to a corporation aggregate, even if the corporation life is limited.

107. Power to take by devise. Corporations were expressly excepted in the English Statute of Wills, and consequently lands could not be devised by them; but in this country in the absence of a special statute to the contrary they are capable of taking a devise of land for any purpose necessary in carrying on their business. In some of the states there is a limit placed as to the amount which may be devised to them; in New York a devise in excess of this amount is void as to the exess,

and the next of kin or residuary legatee or heirs may claim such excess; the general weight of authority, however, holds that only the state can complain as in other cases.

108. Power to acquire Personal Property. The general rule is that such personal property, but such only both as to kind and amount as is reasonable necessary for the corporate purposes may be lawfully acquired; there is no limit as to the amount of personal property that may be acquired through the profits of carrying on the corporate business.

109. Power to acquire its own shares. In the United States perhaps the weight of authority allows a corpora tion to purchase its own shares so long as the security of creditors is not impaired thereby. There is no doubt that it may do so in order to prevent loss to the company. In England and in many of the states, however, the rule is otherwise.

110, Power to acquire stock in other corporations. The general rule in the United States is that one business corporation has no general implied authority to acquire or hold stock in another such corporation, organized either for a similar or for a different purpose, as an investment, for speculation, or for the purpose of controllin or managing such corporation. There are some cases, and the English doctrine is, to the contrary. When it is necessary to prevent loss or secure the payment of a debt such stock may be taken, and it is held a paront company may acquire the stock of a branch company; and it is usual to say authority to consolidate implies a power to purchase the stock of the company with which the consolidation might be made.

111. Power to alienate property. Corporations are held to have the power to alienate their property in the ordinary course of business to any extent if creditors or dissenting shareholders or the public are not injuriously affected; if the corporation is a failing one the majority may dispose of all its property forathe purpose of closing out its business and paying creditors, against the consent of the minority; but not otherwise. Such property as is charged with a public trust, or which is essential to the performance of the dutios the corporation owes to the public cannot be sold so as to prevent the performance of such duties. The corporate franchise cannot be disposed of without special authority, and when that is given the theory is that a sale of it is in affect a surrender for the state and a regranting of it by the state to the purchaser, who

takes it subject to the provisions of the law as they exist at the time of the purchase.

The power to sell includes the power to mortgage.

112. Power to act in a personal relation. A corporation may take property that it has authority to own, in trust and administer the trust according to its terms. In some states it is held that a corporation may be an executor, administrator, or guardian, and they are frequently authorized to be such by statute. They also may be an agent or attorney in fact.

113. Right to sue. At commonnlaw a corporation has a right to sue anywhere that it can find the defendant and serve him with process. States may exclude foreigh corporations from suing in the state courts except as to interstate or foreign commerce; but no state can exclude a foreign corporation from suing in the Federal courts; federal corporations also have the right to sue in federal courts.

114. Suit against corporations. For purposes of suit in the U. S. Courts either by or against a corporation it is conclusively presumed to be a citizen of the state, and an inhabitant of the district, in which it is corporated. Alien corporations, such as are formed under foreign governments, may be sued in the U. S. Courts in the district where they may be found doing business. Corporations of other states may be sued in any state where they may be found doing business if proper service of process can be made upon them; and it has been held that a corporation is doing business in a state when a travelling salesman is within the state taking orders for goods, and service of process may be made upon him in suits arising out of business done with him. It is usual to say that the corporation must be engaged in business in the state and that the agent stands in some representative character to the company in order to make the service of process valid and judgment against it effective. Service upon an offider temporarily in the state is not generally sufficient.

115. Pleading. The courts are in conflict as to the necessity of alleging corporate existence; one line of authorities holds that the plaintiff corporation must always allege itself to be such; another line holds exactly the contrary. One line of authorities holds that in a suit against the corporation the plaintiff must allege that the defendant is a corporation

and others hold just the reverse. So too, one line of authorities hold that pleading the general issue or a general denial raises the question of corporate existence; others hold the reverse.

116. Right to have a seal. At common law it was said a corporation could contract only under its corporate seal; the rule is now otherwise, and a corporation is not required to contract under its corporate seal in any other case than an individual would be required to do so; signing is now generally of more importance than sealing, although at common law sealing without signing was sufficient. Any devise adopted by the corporation as a seal will be sufficient. If the seal alone is present it must be proved to be the corporate seal; if a contract is shown to have been executed by the proper officer with authority any seal will be presumed to be the corporate seal. The presence of the corporate seal is prima facie evidence of the agent's authority and the regularity of the corporations action; it is also said to be evidence of a valid and sufficient consideration, but it does not exclude inquiry into those matters. If p resent upon a negotiable instrument it does not make it non-negotiable.

117. Power to make by-laws. A by-law is a regulation made inregard to the relation of shareholders and officers to the corporation or prescribing functions of officers, times and places of meetings, etc. The power to make is incidental to corporate existence, and resides in the shareholders, unless otherwise provided. This authority may be conferred upon diroctors. In the absence of special statutory authority, there is no power to provide by by-laws for forfeiture of shares for non-payment, or to prevent the transfer of shares, or to create a lien upon shares that will be effective against trasferees without notice, or for the expulsion od members of a corporation having a capital stock.

By-laws must be reasonable, conform to the charter, to statutes and to the common law, must operate uniformly and not be in restraint of trade. They cannot modify vested rights, change terms as to dividends, increase or decrease liability of shareholders, or enlarge corporate powers. Members but not third parties are presumed to have notice of their provisions.

D. THE DOCTRINE OF ULTRA VIRES.

118. Meaning of the term. Ultra vires literally means beyond the power; in its qualifications to corporation law it means beyond the authority of the corporation,-- the corporation may have the power but not the rightful authority to do the act; and since there is no authority to do the act there is no authority to ratify it even if all the shareholders should consent; there are various theories as to the effect of an ultra vires act; some authorities say such acts are void, and others say they are voidable only. The reasons for both these rules are (1) The interest of the public that the corporation shall not transcend the powers granted; (2) the interest of the shareholdrs that the capital shall not be subjected to risks of enterprises not contemplated by the charter; and (3) The obligation of every one contracting with the corporation to take notice of the legal limits of its powers. The doctrine is now confined almost exclusively to contracts, and is not applied in the law of torts.

119. As to executed contracts. Ultra vires contracts, wholly executed by both parties will not be disturbed upon complaint of either party; the court will leave the parties as it finds them.

120. Executory contracts. Ultra vires contracts wholly executory, that is, not performed by either party, may be repudiated by either party to the contract; in fact it is usually said to be the duty of either party to withdraw from it, and when he does no action for damages will lie, and a court will not decree specific performance.

121. Partially executed contracts. There are two general views as to the legal effect of such a contract; the rule in England in the Supreme Court of the U. S., and in several of the states is that such a contract is absolutely void as a contract, and no action in any form can be maintained upon it. However, if the person who has performed his part has parted with anything of value that may be recovered of the other party in any form of action proper for such purpose.

The other view held by the great majority of the state courts is that the person who has not yet performed his part, but who accepts and retains any of the benefits received from the other party is thereby estopped from denying the validity of the contract, and consequently it is enforceable according to its terms by the other party.

122. Who may complain of ultra vires contract. (1) The state may if the public is affected; (2) The parties may except as limited in the preceding section; (3) Shareholders may enjoin the completion of an executory ultra vires contract, and in some cases if they act promptly may have an executed ultra vires contract set aside; (4) Creditors cannot usually complain, but where the ultra vires contract would, if performed, make the corporation insolvent, it has been held that the creditor can enjoin its performance. Outside parties although they might be in some way effected by the ultra vires contract cannot enjoin its performance.

D. LIABILITY FOR TORTS AND CRIMES.

123. Torts. Corporations are liable for torts substantially as the master is liable for the torts of his servant while engaged in the master's business; and in this connection the managers of the corporation are practically the corporation, the whole of the corporate duties being vested in them.

They have been held liable for damages for assault, battery, false imprisonment, libel, malicious prosecution, fraud, deceit, conspiracy, trespass, nuisance, negligence, etc. It is said they are not liable for slander, because slander can not be committed by an agent, but this does not seem right. By the weight of authority a corporation is liable for torts arising in a business that is ultra vires. They are liable for exemplary damages as masters are for torts of their servants.

An exception is made in the case of charitable corporations, such as hospitals, etc. that receive no compensation for their services; the funds of such institutions are not taken to pay damages for torts committed by their agents, such agents alone being held.

124. Crimes. Corporations are held liable for crimes arising out of non feasance or misfeasance, and also for criminal libel. There seems to be no good reason why they might not be held criminally liable for many other offenses, even for felonies of the higher grade, except that the criminal laws do not usually provide penalties that could be applied to them; there is a tendency to hold them liable for such crimes as may be punished by fines.

Corporations are liable for contempts of court as individuals are, and may be punished therefore by fines imposed upon them.

THE CORPORATION AND THE STATE.

125. General methods of control. (1) By the Courts: The state by permitting actions at law and suits in equity exercises general control over corporations as over other persons. But the state also exercises by visitation through the courts special control over corporations under certain circumstances.
(2) By legislative bodies: Certain powers such as general regulations of all persons whether natural or artificial within the state, inhere in Congress and the state legislatures; other special legislative powers, are frequently reserved to the state when the corporation is created. The legislative power of course is limited by constitutional provisions.

126. Constitutional limits on legislative control: (1) Upon Congress,-- direct taxes shall be apportioned among the states according to the population; bills of attainder and ex-post facto laws shall not be passed; taxes or duties shall not be laid upon articles exported from any state; preferences shall not be given to ports of one state over those of another; nor vessels shall not be obliged to enter, clear, or pay duties in another. (2) Upon state legislatures,-they shall not pass bills of attainder, ex-post facto laws or laws impairing the obligation of contracts; lay imposts or duties on exports or imports, or any duty of tonnage; nor abridge the privileges or immunities of citizens of the United States; nor deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws; provisions similar to the last three are usually found in state constitutions also.

A. THE STATE AND ITS OWN CORPORATIONS.

127. Control by the CourThere are five special methods available to the courts, usually authorized by statute, but existing at common law: These are (1) Quo Warranto,or an information in the Nature of Quo Warranto, as it is now called; (2) Scire facias; (3) Mandamus; (4) Injunction; and (5) Indictment. While it is usual for the Attorney General to start these proceedings, the Court itself has authority to direct some one to bring them; and by statute in many states, the proceedings may be on relation of any individual.
The writ of Quo Warranto was issued to bring a corporation before the court to show by what authorityit claimed or exercised corporate franchises, and was applicable to cases

where there never has been a right, as well as where there has been a cause of forfeiture by neglect or abuse; the same end is now accomplished in a simpler way by an Information in the nature of quo warranto; the judgment was an ouster and seizure of franchises.

Scire facias, was used generally where there was a legal corporation which had abused its authority, and it was called upon to make known why it had done so; the judgment was the same as in quo warranto.

Mandamus, was a writ issued to compel the performance of a definite corporate duty fixed by statute, charter provision, or by the common law.

Injunction, is a writ issued by a court of equity to prevent the doing of some threatened act.

An Indictment, was a criminal proceeding to punish a corporation for creating a public nuisance, or other misdemeanor.

128. Causes of forfeiture: Any abuse, misuse, or non use, of corporate franchises, to the injury of the public, is cause of forfeiture by the state in quo warranto or scire facias; such as engaging in unlawful combinations; in illegal insurance, or banking; for fraudulent organization; wilful or negligent non user; etc. Also for usurpation of any public franchise; or imperfect or insufficient orgainzation, or exorcising corporate powers after expiration of charter; also for illegal intrusion into a corporate office.

129. Statutes of limitation and waiver: There is an English rule that after six years after cause of forfeiture has elapsed, upon the relation of a private individual, the courts will not entertain a quo warranto but no such rule applies to the state or the king, statutes of limitation unless the state is expressly named, do not run against the state. Many of the states have, however, provided that the state shall not bring quo warranto proceedings after a certain time, varying from 8 to 20 years. The legislative body, may, after a cause of forfeiture has occurred, waive the state(s right to complain, and the failure of the attorney general to act has a similar, but not the same effect; a waiver by the legislature pardons the offense, and the state cannot afterwards forfeit the charter for that offense.

130. Mandamus: This is a prerogative writ to compel the performance of a duty. Whenever a specific and determined legal duty is imposed upon a private corporation, expressly or implied, either by statute, or common law, and there is no other adequate remedy for its enforcement, mandamuswill lie in a suit in behalf of the state to enforce the public duty, or in case

of a private right, on behalf of the person to whom the duty is due, but not to enforce a mere optional corporate privilege or to control discretion; it has been used to reinstate a member, compel the calling of meetings, or inspection of books, or a transfer of shares; or to compel public service companies, as water, gas, telegraph, railroad, etc., to perform their duties to the public, or to individuals.

131. Control by courts of equity. Those courts have no general jurisdiction to dissolve corporations, though it was held in Michigan that where dissolution was necessary to prevent the continuance of a fraud in a suit of which the court had jurisdiction, it could go to the extent of decreeing dissolution; such power under such circumstances is frequently conferred on such courts by statute. Neither do courts of equity usually have power to enjoin corporate acts without there are other grounds of jurisdiction. An injunction may be granted upon the application of the state whenever a corporation is abusing the powers given it for a public purpose, or acting adversely to the public, or creating a nuisance or threatening to do these; or to prevent a dissipation of the funds of a public charitable trust when the beneficiaries are so numerous and indefinite that the trust can be preserved only through the public authorities. A shareholder may enjoin the acceptance of fundamental changes, the diversion of funds, or the completion of executory ultra vires transactions.

132. Control by private visitor: In the case of charitable corporations, the person who endowed the charity, had the right to appoint a visitor to see if the funds were applied according to the terms of the gift; if he did not appoint any, the the right to do this resulted to himself and hid heirs; but since we have abolished the English primogeniture rules of descent and all a man's children become his heirs, such method of visitation is impracticable, though if not waived, the legal right yet remains; Statutes, however, usually provide other methods now.

133. Control by public visitor:
In most of the states there are railroad, insurance, and other commissioners, whose duty it is to inquire into and report upon the condition of various kinds of corporations; these are provided for the protection of the public.

134. Control by the legislature: This is either; (1) Ordinary, or (2) Extraordinary. In the exercise of the ordinary legislative powers, corporations are subject to (a) the power of eminent domain; (b) the police power; and (c) taxing power.

In the exercise of extraordinary powers, under some circumstances, corporate charters may be (a) Repealed, (b) Amended.

135. Power of Eminent domain: Corporations, like natural persons, are subject to the power of the state to take any of their property or their franchises, for public purposes upon making due compensation. The general rule, however, that property already devoted to a public use cannot be taken for another public use without express authority; and it is sometimes said that the new use must be different from the old use,--that is one railroad company could not be authorized to take the whole line of another railroad company to be operated in the same way; horse street railways, however, have been taken by electric companies, and toll roads have been taken by the state and turned into free roads.

136. Police power. Corporations are subject to the police power of the state the same as individuals; although they may be chartered for the express purpose of carrying on a lottery, or manufacturing liquor, subsequent legislation may forbid such acts, without impairing the contract, for the reason that no one can obtain a vested right in any business that is dangerous to the public health, the public morals, of the public safety. The state cannot surrender, or barter away, its control over these subjects. Under this power also, the rates to be charged by public service companies (within the limit that fornids depriving them of their property without due process of law), may be fixed or regulated; so reports from insurance, trust, building and loan, bank and other like

companies may be required for the protection of the public. The general limits of this ppwer is, that in case of lawful businesses, property cannot be confiscated by the state, vested rights divested, or the performance of natural functions interfered with by the state legislation.

137. Taxation: The state's power to tax corporations is the same as in the case of individuals. The corporate elements of taxation are : (1) The primary franchise; (2) Secondary franchises; (3) Its propesty, real or personal, tangible or intangible; (4) Its capital stock, authorized, subscribed, or paid in; (5) Earhings, gross or net, or profits; (6) The shares of stock owned by shareholders. It is possible that all of these might be taxed at one time without being illegal, though it would be in some sense double, or treble or quadruple taxation.

138. Taxation of franchises: It is not usual to separate the primary franchise,-- the right to be a corporation and exercise corporate powers, from the secondary franchises, such as occupying the streets by a street railway, for the purposes of taxation. Some courts seem to think that since the state charges a very small or no fee for incorporation, the primary franchise has no value; the proper view, however, seems to be that is value is whatever it adds to the convenience, efficacy and safety of conducting the business by the corporate form of organisation over other forms; in other words what would those who have it give for it rather than do without it. Its value is difficult to estimate, and many rulesfor ascertaining its value have been suggested. Without attempting to separate the primary and secondary franchises these two methods of valuation have been approved, viz: First, find the market value of all the shares and bonds of the corporation; from this subtract the assessed value of all the real and personal property, and the balance will be the value of the franchise. A second: Ascertain the total net earnings (usually the average for a period of years); capitalize these at the average rate of interest upon short loans; from the total amount so found, subtract the assessed value of the real and personal property, and the balance represents the value of the franchise. Both of these in fact are based upon the earning capacity of the capital of the corporation, and is the business man's estimate of its value.

The situs of the secondary franchise, like operating a street railway, for purpose of taxation is where the line is operated; the same is true as to a railroad corporation. The situs of the primary franchise is usually considered as being at the principal office of the corporation; it undoubtedly can be, however, considered as having a situs wherever the corporation does business in proportion to the business done; and it is usually so considered when business is done in two or more states.

It may be, but is not usually, unless specifically named, included in the term property, for purposes of taxation. But under a statute requiring all property to be taxed according to its true value in money, the Adams Express Company's franchise was taxed in this way: the total value of all its stock was $16,000,000; the value of all its property, -- horses, wagons, officers &c., was $4,000,000,-- $22,000 of which was located in Ohio; it was organized in New York; a valuation of $88,000, less $22,000, was held to be the proper value of its franchise and good will in Ohio.

139. Taxation of property. The corporate property, of whatever kind, is subject to taxation the same as that of individuals. There is a tendency now to consider the property as a unit devoted to a special purpose and have all of it assessed by one state board, instead of by local assessors. After it is assessed by the state board, the apportionment may be , and frequently is, made among the various local subdivisions of the state in proportion to the business done in these districts, or mileage therein, in case of railroad and telegraph companies, &c.

140. Taxation of gross or net earnings. These may be the basis of taxation in the case of corporations not engaged in interstate commerce, or upon those that are not derived from such commerce. But the states cannot directly tax corporations upon earnings derived from such commerce. It has been held however, that corporations may be taxed upon their capital stock, and the tax may be graded according to the gross or net earnings, whether they are partly derived from interstate commerce or not.

141. Shares of stock. These are taxable although the corporate property or capital stock is taxed, and whether this is at its actual or face value. In several states it is held that this is not double taxation; in others it is held to be such. The situs of shares for purposes of taxation is usually the domicile of the owner,--but the state may make their situs to be that of the domicile of the corporation, and tax them there, even though their owner lives in another state and is taxed there on the same shares. It has been held also that alien owners may be taxed higher than resident, but this is not the case where the owner simply resides in another state of the Union.

The states cannot tax the franchise of a National Corporation, without the consent of Congress, nor can it tax any national governmental agency; neither can it tax a patent right granted from the government, but it may tax the machines or property constructed under the patent.

142. Repeal and forfeiture. These have already been mentioned under dissolution. If there is no power reserved to the legislature, it can not repeal any charter; if the power to repeal is reserved without qualification, it may be exercised at any time with or without giving any reason for so doing. Vested property rights are not destroyed, however, by such

repeal; if the power to repeal is reserved upon the happening of some condition, some cases hold that there must be a judicial determination that the condition has happened, before the legislature can act; other cases hold that the matter is wholly within the power of the legislature to determine.

No reserve power is necessary for forfeiting the Corporate franchises for abuse or non use; this power is implied from the nature of a franchise, and can be enforced only in the courts after a proper judicial determination of the facts. A court of law alone has the power to dissolve for breach of duty, and generally only on complaint of the State by the Attorney General.

143. Amend. Since a charter is a contract, the general rule here is that it can be amended only by consent of both parties, that is the State and the Corporation; and further, since there is also contained in the Charter a contract between the Corporation and each member the corporation can not accept an amendment unless each member consents; and this is the rule in this country concerning material amendments, when the State has not reserved the power to amend. Under the transcendent power of Parliament, however, a material amendment could be imposed upon the corporation without its consent or that of its members,--or they could be required to stop business. Perhaps Congress has a like arbitrary power as to corporations created by it. Under a reserved power to amend, the states have much the same power as Parliament,--that is an amendment even though material, may be tendered and if not accepted the state may take away the corporate life. But in this connection it has been held that what the state offers must be an amendment, not something wholly new and different,--such as requiring a bankrupt company to build a railroad.

Two views are taken also as to the power of the majority to accept an amendment if the power to amend is reserved to the state when the corporation is formed. One line of cases holds that the majority have the power to accept material amendments against the dissent of the minority; other cases hold that unanimous consent is necessary.

B. The State and National Corporations.

144. In general, national corporations are not foreign corporations in any state, unless they are created to operate in one of the territories or in the District of Columbia; in which

case they are substantially the same as if created by the legislature of one of the states; Congress merely acting as the local legislature in these cases. But corporations created by the national government to perform its national functions, to operate in any state are not foreign corporations in any state. By the National Banking Act a national bank located in any particular state is for most purposes treated as a citizen or inhabitant of that state; it, however, cannot be taxed in such states, or the exercise of its powers restricted by the state where located, in any other way than such as is expressly authorized by the national laws.

C. The State and Foreign Corporations.

145. Right of a foreign corporation. Strictly speaking the states of the Union are foreign to each other in most matters relating to corporation laws; the ownership of property so long as it is legal, in any state by a corporation organized in another state is protected as the property of an individual is, and so long as its acts within the state are legal, it is protected under the National Constitution provisions. Its right, however, to do business in another state, than the one creating it, is based upon mere comity and can not be claimed as a legal right; it has the power to do business anywhere (if not limited by its charter), but its right to do business in any other state than the one creating it, depends upon the consent of the state where it seeks to do business.

146. Right to engage in commerce. While the general rule as stated in the preceding section, prevents a foreign corporation from entering and establishing a place of business and exercising its corporate franchise there, without the consent of the state, any corporation, just as a national person, under the National Constitution has the right to engage in interstate or foreign commerce,--and this cannot be exercised or controlled by any state.

147. What is interstate or foreign commerce. There is some difficulty in determining this; but in general it includes buying and selling, and transporting across state or national lines, any commodity, or the travelling of any person, or the transmission of intelligence by telegraph or telephone, across state lines. These things cannot be prevented or regulated by the states. A foreign corporation may make purchases through the mails, or it may send its travelling salesmen, or solicitors into other states to make sales, or purchases,--and if goods are to be sent by the corporation to fill an order taken, or

are to be sent to the corporation to fill a purchase made, across state lines, this is interstate commerce. It has been held also that a ticket agent in one state to solicit passengers over a certain railroad not having any part of its road in that state, is engaged in interstate commerce.

Insurance, or borrowing, or loaning money, or manufacturing, or mining, or farming are not commerce.

148. Right of state to exclude. Within the limits above given any state has a legal right to exclude any corporation xorganized in another state (that is not an agent of the national government), for any reason, or without any reason. And after it has once granted a license to do business in the state, this license can be revoked at any time, though a valuable consideration was paid for it, without violating the national Constitutional provisions.

149. Methods of exclusion or restricting: The states usually provide:

(1) That before doing business in a state, a foreign corporation shall appoint some one within the state upon which service of summons shall be made;

(2) That when the corporations of State A. are excluded by State B., then State A. will exclude the corporations of State B.,--these are called retaliatory laws.

(3) That suits against such foreign corporation shall not be xremoved by it to the federal courts;

While a provision of this kind cannot prevent the removal of a suit to the federal courts, the state may afterward exclude the foreign corporation that so affends from doing business in the state.

Certain penalties are usually provided for violating these provisions. Much controversy has arisen as to the validity of contracts made with a corporation that has failed to comply; the weight of authority probably is that if a penalty is imposed either upon the offending corporation or its agent, that is the exclusive remedy, and the validity of the contract is not affected and may be enforced; this is particularly true when the complaining party who seeks performance of the contract is the person contracting with the corporation, since such a provision is specially designed for his protection; if the corporation is complainant many cases hold it can enforce a contract made by it before it complied with the law; another view is if there is no penalty, and the corporation has not complied, the contract is void and unenforceable by either party to it.

This does not seem reasonable, so far as complaint is made by one contracting with the corporation. For non-compliance in either case, the state can undoubtedly exclude the corporation.

E. The National Government and State Corporations.

150. Taxing power. Under the taxing power of the United States Government it has been held that State Banks with power to issue bills and notes can be taxed by the National Government so heavily as to make it impossible for it to do a profitable business of this kind, and this is true even if the National Government did this for the expres purpose of protecting the National Bank issues and destroying the State Banks. This power has been suggested to be such that state corporations which engage in interstate commerce can be taxed so heavily by the National Government upon such business that they cannot profitably do such business, and in that way the National Government can control the recent corporate trusts. No case has yet been decided, and no legislation has yet been had by congress undertaking to do this. In the case of the bank it was allowed to re-organize as a National Bank and thereby come directly under the national control.

151. Adopting State regulations. Undoubtedly though Congress has exclusive regulation of interstate commerce, it may adopt regulations made by the state that have the effect to exclude corporations or others from carrying on business that they otherwise have the right to do as interstate commerce, even against the State's consent. In this way the national law makes it illegal to import into any state that has a prohibitory liquor law, liquor contrary to that law.

151. Interstate Commerce. The national government has provided an interstate commerce commission, and authorized it to investigate and determine the validity of rates charged by railrods engaged in interstate commerce; it has no powers, under the present act, to fix rates, however.

152. Anti-trust Acts. The national government, in 1890, passed an anti-trust act, forbidding any contract or agreement which monopolized or attempted to restrain or monopolize interstate, foreign or territorial trade or commerce, under certain penalties and requiring the various U.S. District Attornies to enforce its provisions, and giving an injured party an action for damages for the injury he suffered because of such illegal trust. It does not forbid or prevent a monopoly in the manufacture of things, for this is not commerce; but any contract or agreement which directly restrains such commerce is forbidden.

SPECIAL RELATIONS.

A. The Corporation and its Promoters.

153. Duties of promoters. The promoters owe to the corporation the general duty to take no advantage of it, if they, while engaged in promoting the company, buy property for the corporation , they must let the corporation have it at the price paid by them for it,-- this is because they are in a relation of trust toward the unborn corporation, when they are acting for it. If they own property and purchase it from themselves while engaged in promoting the corporation, they muat not pay more than the property is worth. If they own or acquire property for themselves while not acting for the corporation, they have the perfect right to sell it to the corporation at any price they can obtain, provided they do not themselves, or by their dummies, represent the corporation in making the purchase.

154. Liabilities to corporation or its shareholders. For all profits made by them in promoting the company, or while acting for it, they are liable to the corporation or its shareholders.

155. Liability to party dealt with. They are personally liable to one dealing with them, even though their dealing is in the name of the corporation for the reason that there is in fact no principal in existence that they can represent. This liability perhaps can be excluded by drawing the contract in a way that makes only the corporation liable if any one .

156. Liability among themselves. As between themselves, so far as they act in forwarding the scheme of incorporation in accordance with their agreement, they are substantially partners for the particular purpose, and one is bound by the acts of the others in carrying out the scheme in the way contemplated. But as to other matters, only those who authorize, consent or ratify the acts of the others become liable therefor.

157. Liability of corporation for acts of promoters. Inasmuch as the corporation does not come into existence until after the promoters' acts bring it into existence, it cannot be a party to a contract made for it by its promoter, and so is not liable thereon, unless it expreely or impliedly ratifies or adopts the act or contract after it has come into perfect existence. It is provided by some statutes that the corporation shall be liable for the necessary expenses incurred in its organization. Some states say that the adoption of a promoters contract by the corporation is really making a new contract which dates from the time of adoption, and must be entered into with all the formalities then required to bind the corporation.

B. The corporation and its officers.

158. General relation. There are theories as to this relation:
1. That the officers, including directors, are merely agents of the corporation or the shareholders; this is not quite correct for the directors have the power to act in good faith in a way that does not coincide with the shareholder's view.
2. That they are trustees; This is not entirely correct, for there is no separation of the titles into legal and equitable and vesting the legal title in the trustees and the equitable title in the corporation as there would be in the case of a true trust.
3. That they are mandatories;this is not altogether correct, for there is no vesting of the legal possession of the corporate property in them as a special property, as there is in the case of bailees. The truth is the relations of directors and officers id sui generis, involving relations analagous to all of the above, but not exactly the same as either.

159. General rule as to duties. They owe the corporation the duty to exercise diligence and care, and a reasonable business judgment and prudence, in managing the corporate affairs, and for failure in this direction they may be held in an action for damages by the corporation; they have no right to any profits made by them while working for the corporation; all such belong to it and may be recovered by it. They are liable for geoss negligence in managing the corporate affairs or selecting unfit servants, or failure to use ordinary care to supervise their acts afterwards.

160. Right to remove corporate officers. There is no well defined power to remove elected officers--as directors, president, &c. whoqare elected for terms fixed in the charter, general law or by-law, before the term has expired; this way may be provided for by by-law provision allowing it, a Court could, upon proper showing, remove such officer if he was violating his trust in a way similar to the removal of other trustees. Agents, though hired for a definite time may be removed, subject to liability for damages if removed without cause before their time of service has expired; if not hired for a definite time, they can be removed at any time by the corporation, without making itself liable for damages.

161. Right of officer to deal with the corporation. The general rule here is that the officer cannot rightfully represent both himself and the corporation in making a contract with it; any such contract is voidable by the corporation or its members, even though it was in fact fair and reasonable; if the corporation however is represented by other officers that have power to act for it in the transaction, there is nothing forbidding an officer from dealing with it and such contract is valid. The same rule applies to corporations having common directors or

officers dealing with each other through such officers,-- if they are represented by non-common officers who could do it by their action, the contract is valid; otherwise voidable.

162. Right to salary. The general officers in corporations including directors, are supposed to serve in their capacities as such without compensation, and hence after they have so cated, they cannot, without consent of shareholders, be voted salaries as back pay--for such a thing would be giving away the corporate funds; for any extraordinary service not included in the ordinary functions of the office there is an implied promise to pay and in such case the directors have the right to fix the amount. The shareholders usually reserve the right to themselves to fix the salaries of the general officers, and leave to the directors the right to fix other salaries. There is an implied promise to pay any officer or any person who devotes his whole time to the service of the company in ways other than merely performing the duties of his office.

C. The corporation and its shareholders.

163. In general, the corporation has a right not to have its existence denied by its shareholders,-- they are estopped; to issue preferred stock under some circumstances,; to regulate transfers; to carry on the enterprise as the majority or the directors shall direct; to accept amendments, under some circumstances by majority vote, and if in failing circumstances, to dissolve itself.

164. Right of corporation to collect subscriptions. In all the ststes except the New England States every subscription to stock that does not so state otherwise, is considered as including an implied promise to pay for the shares when the corporation needs the money; it is not usually a debt due immediately upon subscription (though some statuts make part of it such) but only an agreement to pay when demanded by the proper corporate authorities.

165. Calls. Before any particular amount is due upon any subscription a call is to be made by the directors; this, at common law was simply passing a resolution saying that a certain percent of the amount subscribed should be due and payable at a certain time; Every shareholder was supposed to take notice of such resolution, and was in default if he did not comply with it; it is usual now to require notice of some sort to be given of the fact of making the call, and also of the time and place where it shall be payable. It becomes a debt due the corporation, as soon as due, and may be sued for by the corporation; to be valid calls must operate equally and be uniform on all. There is no right unless expressly conferred, to call for any more than the face value of the amount subscribed, or the amount agreed to be paid in the subscription contract.

166. Evidence of Membership. The corporate records, such as the subscription or transfer books, are prima facie evidence as to who is a member; they are not, however conclusive; one whose name is on the books may show he is not in fact a member; or one whose name is not on the books may show that he is entitled to have it there, and demand that it be put there.

167. Right to vote. At common law every member had a right to one vote on every proposition and no more-- did not vote according to shares owned; now by custom, by-law, charter or statute the rule is almost universally the other way and a shareholder has one vote for each share owned. The holder of the legal title has the right to vote; executors and administrators vote the stock belonging to the estate before distribution; the corporation cannot vote its own shares held by itself; a shareholder can vote as he sees his personal interest, even though such is in conflict with the corporate interest.

168. Proxy. At common law, the member, unless the charter expressly authorized, had no right to vote by proxy, but must vote in person; now statutes universally allow voting by proxy, which is simply the appointing by the shareholder of some one to be his proxy or attorney in fact to attend a certain meeting and vote all the shares that his principal owns, upon all questions lawfully coming before that meeting as fully as the owner could if he was present. No special form is essential.

169. Irrevocable proxy. There have been some attempts to make proxies irrevocable,- but they cannot be so made even for a consideration; they are considered as such a separation of the interest and its control as are contrary to public policy; hence anyone that has given an irrevocable proxy can cancel it at any time.

170. Voting trusts. Voting trusts are agreements among shareholders to vote all the shares they own in the way the majority of the parties to the agreement direct, or in the way some trustee or outside party shall direct; when entered into for the purpose and having the effect of placing the control in a minority of the shareholders they have generally been held voidable and unenforcable at the option of any party to the agreement. In some cases where they serve the purpose of sustaining or preserving rights that otherwise might be in peril they have been upheld; and they are generally upheld in California and New York.

171. Cumulative voting. This is a method authorized by statute, which allows the minority of shareholders to obtain representation upon the directorate. If A. owns ten shares of stock in a corporation having 5 directors, he would have the right to vote 10 shares for each director, or 50 for all of them; and this is the usual and the only way unless some other method is expressly

provided. The cumulative method would permit A. instead of casting 10 votes for each, to cumulate them, and cast the entire 50 votes for one, and none for the others—or 25 for each of two members to be elected.

172. Dividends. A dividend is a sum set aside out of the corporate profits to be divided among the shareholders in proportion to their holdings; they must be, in order to be valid, declared out of the corporate profits,— that is, the balance after all current expenses of operation are paid, and fixed charges, and losses in capital are provided for. When the corporation has earned profits which could be applied to the payment of dividends, and also has the power to increase its shares of stock, it may keep the money and declare a stock dividend, by issuing shares instead,to an amount in face value equal to the profits to be divided. Before they belong to the shareholder, and not to the corporation, they must be declared by the Board of Directors, and the funds set aside to pay them; from that time the shareholder is considered part owner of the fund so set aside, though not yet due; without this setting aside of a particular fund or amount out of which payment is to be made, the shareholder is a mere creditor to the amount declared, and must share with the other creditors in case insolvency afterward occurs before payment. The shareholder must demand payment before the corporation is in fault; after that he can sue the company for refusing to pay, either in assumpsit or debt.

173. Who entitled to dividends. The owner of the shares at the time the dividends are declared is entitled to them, and it makes no difference when they were earned, or when they are to be paid. If A. is the owner of shares when a dividend is declared it belongs to him, though it does not become due until after A. has transferred his shares to B. So too, if A. sells to B. before a dividend is declared, it of right belongs to B. Though it is declared before the transfer on the books is made to B.; in this case, however, the corporation will be justified in paying A. if it has no knowledge of B's. claim; and generally the corporation is protected if it in good faith pays to the registered owner.

174. Between life tenant and remaindef man. The cases are in conflict as to this; One holds that if the dividend is a money dividend it is always to be paid to the life tenant as income; but if it is a stock dividend it is all to be paid to the remainder man as a part of the estate. Another rule is that if the dividend is ordinary,,one arising from the ordinary operations of the company, it will all go to the life tenant ; but if extraordinary, such as declared out of the capital when the stock is lawfully reduced, all of it should be paid to the remainder man. Another rule, and the one having the weight of authority, is that the Courts will investigate when it was earned; if earn-

ed before the death of the person creating the tenancy for life, and in remainder, it will go to the remainder man; if in fact it represents earnings accumulated it will go to the life tenant, whether paid in money or stock.

175. Transfer of shares; the right to transfer. The general method of transfer has been described. The right to transfer is an incident of the ownership of the property in the shares-- and the corporation, unless the state expressly allows cannot prevent such transfer, although it may regulate it by reasonable provisions for the protection of the corporation. There is no right generally recognized in this country, to transfer shares after insolvency, or to an incompetent or insolvent person for the purpose of evading liability.

176. Registration of transfer. There are two theories as to the necessity of the registration of the transfer on the books of the corporation,-- one is that the legal title does not pass by delivery of the certificate duly endorsed and assigned,--registration being essential to pass the legal title, only an equitable title passing without;---- the other is that as between the parties themselves, and all other parties claiming through them the whole title passes by the delivery of the certificate duly endorsed with a power of attorney to have the transfer made on the books of the company. As between the corporation and the transferror or transferree until the registration is made on the books of the company, the corporation may, until it is satisfied of the right of the transferee, recognize the registered owner. The above rules are of importance in the case of attaching creditors of the transferror, and give exactly opposite results. As between pledgor and pledgee, registration is unnecessary. But the pledgee in order to prevent the possibility of loss usually has the stock registered in his name.

177. Transfer upon forged power of attorney. This has no legal effect upon the rights of the original owner,-- he cannot be deprived of his property by forgery unless he is chargable with negligence. If the corporation accepts and cancels a forged certificate and issues a new one in its place, a bona-fide purchaser of it is protected, but if the corporation has issued all the shares it has a right to issue, the purchaser has an action for damages against the corporation; for the certificate is a continuing representation of the validity of the shares when made to an innocent party; the original owner can claim the rights of membership; the forger or the person who induces the corporation to act is liable to it for any loss it sustains. The same rules apply to lost certificates not due to the fault of the owner.

178. Transfers in breach of trust. When A. holds the shares in trust for B. and there is nothing in the certificates or on the register to show that a trust exists, a bona fide purchaser from A. gets a good title as against B., and B. must look to A.

If the certificate or register shows a trust exists, the purchaser takes it subject to the trust; if the corporation has knowledge of the existence of the trust and of any limit on the power of the trustee to transfer, and they negligently allow him to transfer contrary to his authority the corporation is liable to the party injured.

179. Gift. A gift of shares may be made by delivery of the certificate properly indorsed for that purpose. Registration is not essential to the validity of the gift.

180. Effect of transfer. The general rule is that the transferrer is no longer a member, and is no longer in any way liable to the corporation or its creditors, even though the shares are not fully paid; the purchaser, on the other hand, assumes, if he has knowledge of the facts all the obligations and is entitled to all the rights of the seller. If he has no knowledge that the shares were not paid up, in the absence of any statute to the contrary, he is not liable to the corporation or its creditors.

181. Remedy for refusal to transfer. This is an action to recover the value of the shares, as damages, usually at the time of refusal; but by some Courts the value at the time of trial or the highest value at any time between the refusal and the trial; under some circumstances, where shares cannot be obtained, a Court of Equity or a Court of Law by mandamus, will compel a transfer.

182. Right to inspect books. At common law a shareholder had the right to inspect the corporate books whenever there was a real matter of controversy between him and the corporation, its officers or shareholders which made it necessary to see the books; now by statute generally he has the right at reasonable times to see the books and take copies of the entries by himself or his agent without there being an actual controversy existing; it must be exercised at a reasonable time; if refused, an action for damages will lie, or the custodian may be compelled by mandamus to permit inspection.

183. Right to share in increase of stock. Where the corporation has the right to increase its capital stock each shareholder has a right to subscribe for such proportion of the new stock as his holdings are of the old stock, in preference to outside parties.

184. Right to sue for moneys due the corporation. The general rule is that shareholders have no such right, the corporation being the propor party,--but in some cases there would be a failure of justice if they were not allowed to do so. Whenever the corporation is unableto sue for a wrong done it, then a bona-fide shareholder may upon behalf of himself anf all others, sue to have the wrong righted. The wronge for which suit may be

brought are the ultra viries acts of the agents, resulting in damages to the corporation; the fraudulent acts of the directors or their acting in their own instead of the corporate interest; oppressive or fraudulent acts of a majority of the stockholders The plaintiff must alledge and show that he tried to have corporate action taken through the proper corporate agency to have the wrong righted, and that they refused, or that the wrongdoers were the corporate officers themselves who had authority to have the corporation sue. If the offense charged is one that the shareholders could retify the Courts will not interfere until they have been called to pass upon the matter, unless delay would be perilous if a right existed.

D. Creditors.

185. Creditors and the State. As a general rule, the state unless it has reserved the power to repeal or amend a charter cannot repeal or change the statutory contractual liability of shareholders, so as to impair the security of existing creditors; but the penal liability of shareholders may be repealed or changed and if the state has reserved the power to repeal the contractual liability may be changed; dissolution by the state does not affect creditor's rights; they are enforcable against the assets of the corporation. Remedies may be modified provided they are not substantially taken away.

186. Creditors and corporation. Creditors have all the ordinary rights to enforce their claims against the corporation in the usual way in Courts that they would have against individuals, except property necessary for the corporation to perform some public duty cannot be taken on execution; but the income from it may be sequestrated in Equity or otherwise to pay the claims. Creditors have no right to interfere with or dictate the manner in which the corporation is managed.

187. Preference of creditors. The corporation, by the great weight of authority, has the same right to prefer a creditor in case of insolvency that an individual has; where this rule applies, a bona fide shareholding creditor or director-creditor can be preferred also. In some of the states it is held that as soon as insolvency occurs the assets of the corporation become a trust fund for distribution among all the creditors in proportion to their claims, and the corporation can give no preferences.

188. Assets as a trust fund. The general doctrine is that the capital of a corporation is a fund set apart for the protection of creditors, and cannot be given away, or distributed among shareholders until creditors are fully paid; that there is included in this fund not only any property the corporation may have, but the sums unpaid by the shareholders upon their stock subscriptions, so far as necessary to pay creditors; also all claims

due to the corporation from whatever source can, in some form of proceeding, be recovered and applied to the payment of creditors claims; also all capital of the company distributed to the shareholders that has the effect of reducing the property below the amount of capital stock that the corporation is to have, can be recovered so far as necessary to pay creditors.

189. Right of Creditor to prevent dissipation of funds. As has been stated the creditors have no right to interfere in the corporate management; but some cases have recognized the right of creditors to enjoin threatened wrongs which would destroy the creditor's security, or enjoin waste of the corporate funds, or have conveyances in fraud of their rights set aside. In such cases the creditor must first establish his claim by a judgment at law or in some other way obtain a lien upon the corporate assets bsfore a Court of Equity will give him such relief.

190. Creditors and officers. So ling as officers keep within their authority they do not make thamselves liable to creditors upon contracts they make for the company; if they exceed their authority, they become liable to those with whom they contract; if they commit a tort while acting for the company, they are liable therefor to the person injured. although the corporation may be also;the directors may be liable for tort for permitting such management of the corporation as creates a nuisance; under some circumstances if they are negligent in managing the corporate affairs so the corporation would have an action for damages against them,upon insolvency such a claim for damages is an asset which the creditors have a right to have enforced against the officers, if necessary to pay his claims.

191. Statutory liability of officers. In some of the states where officers fail to make certain repoets , or make false ones, or incur debts in excess of a certain amount , they are made liable for the debts of the corporation; in such cases the statutory method of recovery, if any is fixed, must be followed;but Courts will allow recovery in some of the ordinary forms or proceeding if no special form is provided.

192. Creditors and shareholdors. Creditors have no rights against shareholders in the absence of a special statutory liability, provided the corporation is de jure and the face value of the stock has been fully paid in, and there has been no distribution of the capital stock before creditors are paid. The liability of shareholders arises in one of two ways,

1. From the common law; and
2. Under special statutes,

and the common law liability arises principally under three circumstances;

a. Imperfect organization.
b. Failure to pay in the full amount subscribed.
c. Payment of dividends out of capital instead of profits.
The first of these, arising out of imperfect organization, is based upon the rule that when a number of persons undertake a business transaction and fail to become incorporated the common law partnership liability results; as we have seen , if the corporation is de facto, the weight of authority holds that there is no other than the corporate liability, and not the partnership; and so too where there is an estoppel against a particular creditor, he cannot hold the members to an individual partnership liability. Since the capital stock is a fund for the protection of the creditors , it is in the nature of a fraud for the corporation or its shareholders to claim to have a capital stock up to a certain amount which it has never received; the Courts say that for the protection of creditors when necessary for their payment the shareholders will be required to make this representation good by making payment,--- this is what is usually meant by sating that such subscriptions are a trust fund for the creditor's security. In the third place, if the shareholders divide the corporate assets among themselves before paying the creditors the result is the same, and creditors have a right to have the sum so distributed paid back so far as necessary to pay their claims.

In all these last two cases the creditor's rights arise only after he has established his claim by judgment against the corporation and has taken out execution against the corporate property and had it returned unsatisfied or partly so. Then he has the right to sue the shareholders in Equity to have the sums due the corporation paid in to discharge his claims; he must usually bring a creditor's bill in such a way that the other creditors can come in and share in the proceeds in proportion to their claims.

Judgment against the corporation is conclusive as to the debt of the corporation, and an assessment against the shareholder by the Court cannot be questioned by the shareholder; but he can contest his liability on the ground that he is not a member, or that the jurgment was fraudulently obtained.

A Receiver is usually appointed by the Court who can sue any shareholder in any state, who owes the corporation , to recover the amount so due; the liability of the shareholder is several, but it is usual in the suit to join all, though some are out of the jurisdiction of the Court.

03. Payment in property . Under "b" in the former section difficult questions arise as to the liability of the shareholders who have an agreement with the corporation by which they are not to pay on full for their shares. Such agreements are valid as between the corporation and the shareholders, but are generally invalid as against creditors. So the creditor can require full payment for his protection ; there are four exceptions;--

1. When the shareholder has purchased, in good faith, shares that were not in fact fully paid,-- he is not liable to creditors for the unpaid amount.
2. When the corporation is in failing circumstances, but with the power to increase its stock, and it does this under stress of circumstances, and in good faith to re-establish itself, it may sell such stock at its market value, or issue it as bonus along with bonds issued to tide over its difficulties and those who take the stock or bonds or both in good faith at their market value then will not be held to any further liability in favor of subsequent creditors.
3. It is held in New York and Illinois that a corporation like a railroad company may issue its shares below par, or at their market value, in payment of a construction company for the construction of its road, and such company is not liable to subsequent creditors for the difference between the face value of the shares, and the price at which they were taken.
4. In case shares are paid for in preperty, it is generally held that so long as there is no actual fraud in valuing the property, whatever price it is taken at, even if it is an overvaluation, shall be final and creditors cannor complain; other states, notably Missouri, hold that any overvaluation, though in good faith, must be paid back to the company by the person receiving the shares upon that basis. Many cases also hold that an excessive overvaluation is prima facie fraudulent and the discrepancy will be required to be satisfactorily explained, or made up.

Perhaps good will is property with which shares can be paid, if it really exists in the particular case; labor, services, patents, franchises, &c. are property within the rule.

b. Statutory liability. This is a liability placed upon shareholders over and above their common law liability for the protection of creditors; it is not generally a part of the corporate funds for the purposes of carrying on its business, but it a security for creditors alone;as to its legal character, it is either
1. Contractual, or
2. Penal.

The contractual may be either
a. A joint and several, unlimited primary liability;
b. A joint and several unlimited secondary liability, or
c. A limited primary or secondary liability.

If primary the liability arises at the time the liability of the corporation does; if secondary only after the corporation is unable to pay; if unlimited, it is substantially that of a partner; if limited, then it extends only to the limit which is usually a sum equal to the amount of the subscription, or such a proportion of the debts as the shareholder's shares are of the total shares. If it is primary, the stat-

ute of limitations would run at the same time it does against the corporation, if secondary, only after it was established that the corporation could not pay. It may be provided in constitutional or statutory provision; if it is provided in constitutions, it will be self executing whenever it is fixed in amount, and no special machinery for its enforcement is necessary.

195. Contractual and penal. A penalty is a punishment for doing something that is forbidden and is to be recovered by the state; it can be changed or modified at any time, and it is not enforceable outside of the state; some of the statutory liabilities are similar in form to penalties, but if they are designed for the protection of creditors in such a way that the offender becomes a debtor to the creditor by his failure, they will be considered contractual in nature so as to allow suits to be brought in other states for their enforcement in favor of the creditor. If the liabilty is contractual subsequent creditors have a ve sted right in it for their protection, such as cannot be taken from them without their consent; such a liability also survives and attaches to the estate of a deceased shareholder, and may be enforced against it, or the representative of a deceased creditor can enforce it against shareholders.

196. Enforcement in other jurisdictions. If a special remedy is provided in the state creating the statutory liability of such a kind that the right cannot be separated from the proceeding and this is different from the proceeding in the state where it is sought to be enforced, it will not be there enforced; but if no special remedy is provided and in is of a kind that can be enforced in a foreign jurisdiction according to the ordinary procedure there, it will be enforced there. The usual method is through a creditor's bill or receiver, as described above in sections _____ as to common law liability. The same rules also apply as to the effect of judgments, &c.

FINIS.

LECTURES

ON

SURETYSHIP

BY

PROFESSOR ROBERT E. BUNKER.

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Reported By Munter

UNIVERSITY OF MICHIGAN

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Edwards Bros.-----Publishers,

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L CTUR I.

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We have in this course the subject of GUARANTY AND SURETY-SHIP. In your work in negotiable instruments last year you learned that they were features to some extent of commercial paper, but that they were governed and controlled by the common law and not by the law merchant.

The subject of Guaranty and Suretyship is a subject with which the business world deals everyday. The dockets of courts and the registers of busy lawyers are never clear of cases involving some questi ns arising out of this subject. The prudence of private business in adopting means to enforce the payment of debts the performance of contracts and the disc arge of obligations, and the wisdom of public authorities in taking assurance to insure fidelity in the discharge of public duties, have given this subject an importance in the law inferior perhaps to that of no other.

GUARANTY AND SURETYSHIP OWE THEIR BEING to those practices of private business and those requirements of public business designed to insure performance of obligations and fidelity in the discharge of public duties and in the trust relations. It is a matter of frequent occurrence that one who has entered into an undertaking to do something for another, is required to gove some assurance other than his own promise, and beyond his own personal responsibility, that his undertaking will be executed. If one is indebted or is to become indebted to another, he is frequently called upon to give assurance that the debt incurred or to be incurred will be paid. If one becomes bound to an obligation whatever its nature, he is frequently required to give assurance that the obligation will be met. If one engages to perform certain duties in respect to any position, public or private, he is frequently perhaps generally, compelled to give assurance that he will not make default in respect to those duties. If one undertakes any position of public or private trust, for example an office under the government, an administrator of an estate, a trustee, a guardian, a treasurer of a corporation or the like, he is almost without exception required to give assurance of his fidelity in the work of his office and that he will faithfully discharge the duties of his office and that he will account for all moneys that shall come into his hands, and will turn over to his successor in office, or according to the direction of the principal, whatever balance there shall be. Moreover one is frequently required to give assurance that he will not do any wrongful act, such as he would be responsible for at law in a civil action --such a wrongful act as would amount to MISCARRIAGE, as that term is used in the Statute of Frauds, or, having done such wrongful act, he is required to give assurance that the damages resulting from that act will be liquidated.

An illustration of the first case may be taken from the ordinary CONTRACT OF THE BUILDER who engages, as part of his building

contract to pay any damages which may result to person or property by reason of his unskillful workmanship or negligence, resulting in personal injury or otherwise.

An illustration of the second kind will be found in the case of

Kirkham V Marter, 2 Bar. & Al. 613

It is becoming more and more the practice of private business and the requirements of public authorities that assurance such as I have spoken of is executed in such cases as I have called to your attention. Those concerned in private enterprises look out for their own interests and so they exact security for the payment of debts and for the performance of duties and generally for the discharge of obligations, whatever their nature. In purely private enterprises assurance is exacted in such cases, among a multitude of others, as this: A undertakes to build a dwelling for B according to plans and specifications and to furnish all the material and do all the work required by such plans and specifications. B requires A to give assurance that the work undertaken will be done in a good and workmanlike manner and according to the builder's art, and that it will be completed within the time stipulated. In short, B requires assurance that A will faithfully execute his contract according to its tenor. A's promise and personal responsibility are not sufficient to insure the performance of the contract. Those who furnish material for the building have a statutory lien on the building for the material. This very statute is in itself a species of assurance. There would be no need for such a statute if the party who made the contract for the material were able to meet the contract, but experience has shown that the material man and the laborer suffer in such instances, hence the statute gives a lien for such services.

STATUTES CREATING MECHANIC'S LIENS:

are in general force throughout the United States. This statute is designed to aid mechanics and workmen to secure payment for their services, and also in a greater or less degree to secure the wages of the laborers employed by the chief contractors upon buildings and other improvements upon real property and laborers on railroads and other public improvements, as also the furnishers of material, such as lumbermen, brick manufacturers, &c.

Overton on Law of Liens, Chap. 26

> By virtue of these statutes the material man may by proper proceedings sell the realty of which the building is a part to satisfy his claim, or may compel the owner of the building to pay for materials which the owner did not purchase and concerning which he did not contract and for which he has already paid the builder.
>
> Because of this law, the owner, as a measure of self-protection, should require the builder, unless he is amply responsible himself, to give assurance not only that the work will be faithfully done, but that the materials and labor entering into the work will be paid for by the contractors so that no lien shall attach.

BUT THERE IS NO LIEN FOR MATERIALS OR LABOR entering into the construction of PUBLIC work. At any rate, this is the rule established by the weight of authority, and seems undeniable in principle, inasmuch as public property is exempt from seizure and sale under execution, upon grounds of public necessity. In any event that statute has to be very clear in its terms to warrant the assumption that public property was meant to be included.

BUT LEGISLATION HAS SOUGHT TO PROVIDE SECURITY for the payment of labor and materials entering into the construction of public work. With this idea in view, the Michigan Legislature in 1883 enacted a statute providing that when public buildings or other public works or improvements are to be built, repaired, ornamented &c., the parties entering into the contract --contracting on behalf of the municipality--shall require a bond of the builder or the constructor of the public work that he will pay for whatever material or labor goes into the structure or the public work which is the subject of the contract.

IN THE DAYS OF LOGGING in Michigan experience showed that the contractor who took the job of putting in the logs for the log owner did not always pay his laborers and did not always pay those who furnished the materials for the camp. So along about 1880 the legislature enacted a statute that one who did labor upon logs or any of the products of the forest mentioned in the statute should have a lien upon the product of his work, and the result was that the labor was secured.

Comp. Laws of 1897, sec. 10743 - 45

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LECTURE II.

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At the close of the preceding lecture I was directing attention to statutes designed to afford protection to laborers and material men who expended their labor and employed their materials in public works, and I quoted part of the Michigan statute on this subject. Statutes in substance like the one quoted are generally in force throughout the United States. Statutes giving a lien to the materialman and laborer in the case of private work and statutes requiring a bond for the satisfaction of all debts incurred for labor and materials entering into public buildings afford reasonable assurance that labor and material in both cases will be paid for.

Congress has enacted that any person or persons entering into a formal contract with the United States for the construction of any public building or the prosecution and completion of any public work or for repairs upon the same shall be required before commencing such work to execute the usual penal bond with good and sufficient surety with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract.

U.S. Stat. 1894, C 280; 28 St. at Large p 278

PUBLIC OFFICERS.

All persons holding positions of trust under the federal government, this state or any municipality thereof, are required to give assurance by way of proper and adequate bonds for the faithful discharge of their duties and for the safe keeping of public moneys and valuables. This requirement is so general and so well known and understood as to make it unnecessary to cite any individual instances. Among them, however, are the Notary Public, Constable, Treasures, &c.

SURETY COMPANIES.

Legislation in furtherance of assurance is found in those statutes which authorize the organization of corporations for the purpose of guarantying bonds and undertakings as well as the fidelity of persons holding positions of public or private trust. Companies organized under such statutes, doing their business subject to public inspection, greatly facilitate business and make it easier for contractors and obligors and safer for the public at large. No question in general ever arises as to their responsibility as sureties. Statutes authorizing them are held valid.

Hurd V R.R. Co., 3[illegible] Hun 109
Cramer V Tittle, 72 Cal. 12, 11 Pac. 852, Sept.24 1886; 12 Pac. 869, Feb. 9-1887

TRUST COMPANIES.

Legislation is generally throuout the United States authorizing the incorporation of trust, deposit and security companies, the functions of which vary as the statutes under which

they are organized. The Michigan statute is found in
Chap. 162, Com. Laws 1897
Such companies are generally authorized to become sureties for administrators, guardians or other trustees or persons in cases where, by law or otherwise, one or more sureties are required, and also the assur the validity of titles to real estate. They are the subjects of public inspection and control, to the same extent as banks are. They have become an important factor in modern business life, but whether they have resulted in general benefit may perhaps be questioned.

EMPLOYER'S LIABILITY COMPANIES.

These corporations, authorized by statute, have become a very important and useful adjunct of the manufacturing world and are found everywhere where dangerous machinery is operated from which employes and others may receive injury which, of caused by negligence of the manufacturer, would result in the recovery of heavy damages against him.

This form of assurance is one of the most recent yet devised. It has been known to the business world less than twenty years. The first case on the subject is said to be-
Henry Rifel Barrel Co v Employers Liability Co.
Q B Div Mar. 1884, C of App, July 1884
This form of assurance was brought into being, solely by the conditions of modern life. The common law imposed a liability on the employer for any form of negligence in the employment of operation of machinery whereby the servants of the employer received injury, but this liability was not a serious cause of loss until manufactories had grown to considerable proportions. When it came to be understood that every man engaged in business and every owner or lessee of business property were exposed to heavy losses from accidents to the persons of others, the chande of which no prudent man could ignore, a new demand for accident insurance against personal injuries arose which it was the legitimate function of a client insurance companies to meet.
Emp. Liab. Co. v Merrill, 155 Mass. 404, 29 N.E.529
Anoka Lbr. Co. v Fid & Cas. Co., 65 N.W. (Minn) 353
Dec 1895

This form of insurance affords an interesting instance of the readiness with which the exegiencies of business are met, and also an interesting illustration of the continueing growth of the common law.

THE PRACTICAL WORKING OF LIABILITY INSURANCE

is beneficial in two ways:

1-Meritorious claims are, as a rule, paid without contest. Claims without legal merit are fought by the companies and fot to a finish.

2-In most communities there are practitioners who make it a business to hunt out personal injury cases and try them thru for a percentage of the recovery. The ethics of the profession

frown upon practice of this sort and it is generally conceded that such practice is dangerous and demoralizing. Much of this sort of practice has been eliminated by emp oyer's liability insurance companies.

CONTRACTS OF ASSURANCE DEFINED.

From the foregoing examples and illustrations it is obvious what contracts of assurance are. Contracts of assurance are undertakings to afford security or indemnity against loss that may occur from another's breach of contract or that may have occurred or may occur from another's past or future breach of duty. They include all liabilities of a third person however they may arise and therefore include liabilites arising out of a wrongful act or tort as well as those arising out of a contract.

Kirkham v Marter, 2 B & Ald. 613
Baker v Morris, 33 Han. 586; 7 Pac. 267

Contracts of assurance are defined as subsidiary contracts intended to secure the performance of the contract or contracts assured.

PAST TORTS.

The cases above cited are illustrations of such assur ance.

FUTURE TORTS.

The case of one becoming surety on a building er's bond, wherein he undertakes to indemnify those who suffer injury from the negligence of the builder,in and about his apparatus or in the construction of his work, is an illustration of such assurance.

Contracts of assurance, as we have seen, embrace all undertakings having for their object the further security of principal obligations. Two terms are employed to signify this further assurance and it will be found that such contracts as are designed to furnish additional security for the discharge of the principal obligation pass in the books under the name of guaranty and suretyship.

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LECTURE III

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GUARANTY AND SURETYSHIP CONTRASTED.

The assuring contract passing under the name of guaranty may be made contemporaneously with the contract or contracts assured, or afterward, or before.

Mallory v Dilbick, 21 N Y 412

Guaranty is a collateral and secondary undertaking.

Kerns v Montgomery, 4 W Va 29

The contract called SURETYSHIP is an undertaking which is part and parcel of the contract assured. The two kinds of assuring contracts, guaranty and suretyship, are undertakings to answer for the debt, default or miscarriage of another. It is only in this sense that they can properly be embraced in a single definition. Theyare both within the statute of frauds and must ther fore be in writing and signed by the party to be bound or &c.

Guraanty and suretyship have points in common. Both belong to the family of assuring contracts and resemble each other so closely that courts often confound them. The distinction between them is often shadowy, yet there is a substantial distinction which not infrequently involves important consequences. The term guaranty is often used by parties where the undertaking is clearly that of suretyship. The distinction between the two is clearly pointed out in

State v Wheeler, 95 Ala 371

In this case the court said, "Where the sponsors for another assume a primary and direct liability to the creditor, whether that liability is conditional or not in the sense of being omitted or postponed uhtil some subsequent occurrence, they are sureties, not guarantors. When they assume a liability secondary or collateral to that of the principal, they are guarantors, not sureties." Now do not fall into the mistake of assuming that a contract of suretyship is ever a primary a contract. It is always a collateral contract hitched upon some other contract. So in a contract of guaranty. In this respect they are alike. But the obligation of the surety is coextensive with that of the principal and it is joined so closely with it that the creditor may sue either. The contract of guaranty, however, bears more of the features of a collateral engagement than the contract of suretyship. Still they are both collateral contracts. Both are to answer, not for one's own obligation but for the obligation of somebody else. They both stand to pledge their own liability for the default of somebody else. The moment the contract is a direct or personal contract, it ceases to be a contract of suretyship, or, more properly speaking, it never was a contract of suretyship. It is only a contract of suretyship when it belongs to another contract.

If the sponsors undertake to pay money, or do any act, in the event their principal fails therein, they are sureties, not guarantors. The surety says, I will pay if A does not. The guarantor says, I will pay if you cannot make A pay. That is, if they assume the performance only in the event their principal is unable to perform, they are guarantors, not sureties.

A surety is bound with his principal as an original promisor, and his obligation to pay is clearly absolute. There is no distinction going to the form of the undertaking: The contract of suretyship is joint and several contract of the principal and surety. This does not mean "joint and several' exactly in the sense of jojnt and several obligors, as with the makers of a promissory note (I am now using the suggestions of this Alabama case, supra), but it means that the surety is bound onthat contract as well as the principal, and when default occurs the surety's obligation immediatly matures and a cause of action arises upon it.

The contract of guaranty is a separate undertaking of the guarantor, in which the principal does not join. It has been held that no contract joined in by the debtor and another can be one of guaranty on the part of the latter, tho it is quite likely that a case might arise which would involve only a secondary liability on the part of the sponsor even tho the undertaking were joined in by the principal.

McMillan v Bank, 32 Ind 11
Bygard v White, 52 Pac. St. 140
In re Panf, Ex'r v Hatch Ex'r, 52 Pa St 525

Still down to two or three years ago the matter seemed to be in some doubt in many of the states, just as you will perhaps find it in doubt when you go out to practice. As late as 1892, in

Re Sherman's estate, 151 P. 70, 25 A 35

the court referring to the e other cases, supra, says, 'The extracts from the opinions of the eminent Pennsylvania jurists draw with remarkable clearness and precision the distinctness between a contract of suretyship, and accurately define the respective rights and liabilities of the surety and the guarantor. There has been no departure by this court from the principles announced in them.' But there has not been an ability always on the part of the business cummunity, and perhaps of the profession to apply that distinction, even though so clearly point d out. 'Some courts seem to have be n charmed with the expression that the contract of the surety is to pay if the debtor do not, that of the guarantor if the debtor cannot.' The expression makes a very pretty epigram, but it do s not state a rule of law which courts uniformly observe. The true distinction between surety and guarantoy is obscured by the looseness and lack of nicety of expression and by the fact that the term surety is frequently used in different senses, e g the term 'surety' is sometimes employed to designate any one who is liable to a third person for the debt or obligation for which a third person is ultimately liable to another per-

son's. Sometimes such person is not a sur ty at all; he is strictly a guarantor. Sometimes he is not a guarantor at all, he is simply an indorser. An illustr tion of this is found in the familiar proposition that the surety who is compelled to pay the debt secured is entitled to contribution from his co-sureties and to reimbursement from the principal: propositions which ap ly with equal force to sureties and guarantors, and, we may say, to indorsers as well.

DeCollyer on Guaranty & Suretyship, Chap 6
Case v Shoeman, 61 Hun 472, 16 N Y Supp 236

In this last case the court clearly points out the distinction betw en the two contracts and then makes a mistake in ap lying the terms.

Agai , the term 'guarantor' often, when correctly employed in its strict sense, may vary somewhat in m aning, and the rights and l abilities of a giarantor may vary according to the nature of the given contract. e g a guarantor of collection is not liable until the creditor, after default, has exhausted the prop r legal means of enforcing payment by the principal, while the guarantor of pa ment usually is held l able at once upon default even before any demand has be n made upon the principal.

The guaranty of payment, which in fact ap roaches very closely to a c ntract of suretyship, is nevertheless distinguishable therefrom in this: that the surety undert kes jointly with the principal to see that the debt is apis and to pay if the principal does not, while the guarantor of payment agrees not to pay the debt but, in case of the principal's default, to answer to the creditor for the consequences of such default.

To say that the courts alw ys regard the distinction between guaranty and suretyship is to shut our eyes to a multitude of cases where it is practic lly disregarded. The d stiction pointed out exists, but is disregarded so frequently that great c nfusion still exists. It must be admitted that guaranty and suretyship are frequently used interchangeably by the best courts.

McMillan V Bank, 32 Ind. 1 1
LaRose v Bank, 102 Ind 332

GUARANTY, SURETYSHIP & INDORSEMENT COMPARED. An indorsement is the writing of the name of the holder upon an instrument with intent to transfer the title thereof or strengthen the security of the holder. Indorsement, strictly, ap lies only to negotiable instruments. An indorsement is a distinct contract by itself. It had its origin, in and is confined to, negotiable instruments. It is a contract something in the nature of a guaranty. The indorser simply writes his name on the back or other proper part of the instrument - then the law writes his contract for him. Not so with the guarantor: he writes out his contract.

Oakley v Moorman 21 Wend. 588
Kingsman v Cooping, 137 Ill, 344, 28 N E 48
Osgood's Adm. v Hart, 17 Fed. 575

AN INDORSER IS LIABLE ONLY when the note has been duly presented for payment on the exact date and when due notice has been given him of its non-payment, in strict compliance with the law as to the time and method of service of notice. If these conditions are not complied with, the indorser is discharged, and that without reference to the fact whether he has suffered damages. A guarantor is liable upon receiving notice of non-payment within areasonable time, and even tho notice is unreasonably delayed, this discharges him only pro tanto - only to the extent of thedamages he has sustained by it.

Story on Promissory notes, Sec. 460

A guarantor of payment is liable without notice.

Roberts v Hawkins, 70 Mich 586

The relations of surety and indorser to the assuring contract are very similar. The rights, duties and liabilities or sureties and ordinary indorsers are so clearly alike that most acts which will discharge the one will discharge the other; yet there are differences, e g the same difference exists between suretyship and indorsement as between guaranty and indorsement in this: due demand must be made and due notice given at the time of the maturity of the note, else the indroser will be discharged from all liability; but a surety continues liable upon his contract without demand and without notice and though the creditor sleeps. A surety may stir the creditor into activity by notice to the principal debtor, and for neglect on the creditor's part to pursue the principal debtor the surety will be no longer bound. Not so the indorser: he cannot call upon the holder of a protested note to sue themaker and, if the holder refuses, thereby release himself. If the indorser wishes instant recourse upon the principal, it is his duty to pay the note and sue for himself.

Stephens v Bank, 88 Pa St 163

The liability of an indorser is greater than that of a surety. The surety becomes bound simply for the accomodation of his principal, and whatever defenses the principal succeeds in making inure to the benefit of the surety, whose undertaking is identical with that of the principal. On the other hand, the principal may be able to make a valid defense and theindorser be bound. The contract may never have been good as between the immediate parties, but when an indorser has intervened, that contract will be good as against the principal, although there has been a total want of consideration, provided he who asserts the rights in the contract is a bona fide purchaser, for value and without notice.

THE SURETY BY SIGNING THE PAPER DOES NOT

enter into a new or different contract from that in which his principal has entered. The obligation of principal and surety is generally contemporaneous and is joint, or may be both joint and several; but with the indorser it is different: he usually receives consideration for his promise. If the note he indorses is for

any cause invalid, he is nevertheless bound.

You are all aware that if a note is without consideration or is founded on a gaming or usurious consideration, or is forged, an indorser would be liable on his indorsement notwithstanding the principal might on that account be released from its payment. He would likewise be liable on his indorsement if when he indorsed the paper it had been barred by the statute of limitations and no action could have been maintained on it against the maker.

Graham v Robertson, 79 Pa 72 3 S 611

A SURETY MAY LIMIT HIS LIABILITY to something less than that of the contract of assurance, but an indorser cannot and at the same time pass title.

Lindsay v Price, 33 Te 282

Another mark of distinction between the guaranty, suretyship and indorsement lies in form. The contract of a guarantor or a surety is almost invariably expressed in terms: that of the indorser is implied by law from the fact of signin his name only.

The contract of the guarantor and the surety is a creature of the common law, by which the rights and liabilities of a guaranty and surety are determined. The contract of an indorser is a creature of the law merchant, by which the rights and liabilities of the indorser are determined, modified to some extent by the common law, owing to the fact that the law merchant was administered by the common law courts.

THE CONTRACTS CONSIDERED SEPARATELY: (a) GUARANTY.

A guaranty is a promise to answer for the payment of some debt or the performance of some duty in case of the failure of another person who is in the first instance liable for such payment or duty.

Bell on G & S. 1
Daniel on Neg. Ins. 4th ed S 1752

Another definition is this: A guaranty is an undertaking by one person that another shall perform his contract or fullfil his obligation, and if he does not the guarantor will do it himself.

Atwood v Lester, 20 N I 6 0
Girdey v Capon, 72 Ill 13

No serious mistake will be made in adopting either of these definitions. He who makes the guaranty is called the guarantor; he for whose benefit the guaranty is made is called the guarantee. He who is ultimately liable for the payment of some debt or performance of some obligation in respect to which another acts as guaranty or surety, is called the principal or principal debtor. He who is entitled to enforce the debt or obligation against the principal debtor or his surety, or to hold the guarantor answerable in case of non-payment or non-performance, is called the creditor or, in the latter case, a guarantee.

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LECTURE IV

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AS TO THEIR NATURE, GUARANTIES ARE CLASSIFIED AS general or special, limited or continuing, absolute or conditional. A Guaranty is GENERAL when it guaranties any person who may act upon it.

Union Bank v Coster, 3 N Y 203
Nory v Thomas, 22 Pet 157

A guaranty is SPECIAL when the person or class of persons is specified. It is addressed to a particular individual or firm, and such individual or firm alone has the right to act upon it.

Bank v Bielendorf, 90 Ill 396
Evansville v Kaufman, 93 N Y 273 cs 64.

The foregoing are the usual meanings of the terms general and special guaranty, but the terms are sometimes used in other senses. Thus a given guaranty may be general as to the whole world, to whom the principal may be accredited and to any portion of whom at his won option he may make the guarantor a debotr, and at the same time it may be special as to the amount; or it may be unlimited or general as to the amount and special as to the parties who may act upon it.

Taylor v Wetmore, 10 O. 491

And even when general both as to amount and persons, it may contemplate only a single transaction, or an open and continuing credit embracing several transactions.

Union Bank v Coster's Exrs. 3 N.Y. 214 cs 57

LIMITED GUARANTY:

It is always competent for the guarantor to limit his liability by the terms of his contract in respect to TIME, AMOUNT OR PARTIES, and when he does so he creates what is known in the law as a limited guaranty. If such limitation be disregarded by the party who claims under it, the guarantor himself is not bound. The amount of the liability cannot be enlarged, nor the time extended, by anyone other than the guarantor himself. None can accept the propositions of the guaranty, or acquire any advantage therefrom, unless he is expressly referred to or necessarily embraced in the description of the persons to whom the guaranty is addressed. Guaranties without limitation as to time or amount will be considered to refer to a single transaction.

Knowlton v Kersey, 76 Me 345

An illustration of a limitation in respect to time is found in

Rogers v Warren, 8 Johns 119

In this case the court makes use of the broad principle of construction found inthe maxim, Expressio unius exclusio alterius.

ILLUSTRATION IN RESPECT TO AMOUNT is a very ordinary and usual feature of guaranty. Bank v Coster, supra,

Matthews v Phelps, 61 Mich 327
Crittenden v Fisk, 46 Mich 79
Dustin v Ogden, 47 Ill 125
Omaha Nat Bank v First Nat Bank, 59 Ill 428

Cases in which the amount is limited are frequently cases of continuing guaranty in respect to the subject guarantied. e g, purchases of goods from time to time for which the guarantor undertakes to be responsible from time to time, amount limited by his guaranty.

Crittenden v Fisk supra.

One in trade is frequently able to procure a guaranty from some responsible friend or party which enables him to have a certain 'line', as it is expressed - at a bank, for example, or at wholesale houses. There is a limitation on the amount but in other respects the guaranty is general. A & B are guaranteed a credit, say, of $5,000. by C. Expressed in that way, that is a GENERAL, CONTINUING guaranty as respects the time, and a LIMITED guaranty as respects the amount.

(3) LIMITATION ON IN RESPECT TO PARTIES IS ILLUSTRATED in

Robinson v Bingham, 4 Johns 479
National Bank v Kaufman, supra

'To John Robins. Sir: If you will credit F Johnson goods to the amount of $800. I will be his security that he shall pay you according to the contract

Solomon Bingham, Jr.'

That guaranty is limited in amount, but there is no limitation expressed as to time. Was there any limitation in respect to parties? The court held that there was; that the interest of the plaintiff in the letter of credit was not an assignable interest.

Grant v Mayl r, 4 Cran. (8 U S) 222; co-Op d, 2-603

A CONTINUING GUARANTY IS

one which is not confined to a particular transaction but which covers successive future credits, advances or obligations existing at any given time, either generally or to a specified amount.

Beeks v McCullough, 126 N Y 298; 27 N E 251
Journal Co v Paper Co, 40 Ill App 383
40 Mo App 223 151 Mass 342
24 N E 53

In the Beeks case plaintiff was permitted to show by parol evidence that although addressed to an individual in name the guaranty was really intended for a partnership which was carrying on business under that name.

Dover Stamping Co. v Noyes

It has been said that the tendency is against construing guaranties as continuing unless the intent of the parties is so clear as not to admit of any reasonable doubt.

Birdsall v Peacock, 32 Ost 184; 30 Am R p 572
Whitney v Drew, 24 Wend 82
White v Deal, 15 Conn 457

The tendency is against construing the guaranty as a continu-

ing guarant , for the r asonthat gua anty is an undert king to answer for the obligations of another and all such are to be strictly construed. While the contract is not to be construed differently from anyother contract in that the words are to import an thing other than what ordinary signification cal s for, yet there is nothing to be added to the contract by implicatio . So a man's obligation of course, who answers for the obligation of another, is nar ower i it be confined to a limited time, a set tim , whereas if it be continuing anyo e can readily see that the obligation is enlarged. Now then that enlarged obligation is n t to be assumed. If found at all, it m st be found by a strict construction of the contract.

It is a matter of considera le difficulty to deduce any fixed rules for determining whether or not a guaranty is a continuing one, a d the reas n for this is that the phraseology employed and circumstances under which each guaranty is given, vary so widely. There are, however, afew rules that seem to be fairly well established, although they ave not been always uniformly applied.

1-Where by the t rms of a written g aranty it ap ears that the parties look to afuture course of dealing for an indefinite time, or a uccession of credits given, it is to be deemed a continuing uaranty.

2-Where a guaranty contains no express limitation as to either time or amount, and there is nothing in the instrument itself from which it can be inferred that it as the guaranty or's intention to leave it open as to b th, the guaranty will be understood as referring to a single transaction, and even where a guaranty is unlimite as to duration and the amount for which the guarantor will be liable is considered to be a continuing one, such time and amount m st be reasonable under the circumstances of the particular case.

Lehigh Coal o v Scallon, 31 i n 63

3-Where it is doubtful from the language used whether a guaranty is for a sin le dealing or a continuous one, no presumption will be set up for or against the g arantor, but the sense in which the person making thepromise believed the other party to have accepted it, if in fact he did so accept it, will be given to the contract.

oney v Murphy, 43 o. 57 2 Am Reps 485
Smith v Van yck, 40 App 522

4-Where a guaranty contains a limitation as to amount for which the uarantor will be bound, but contains no limitation as to time and there is nothing in the circumstances surrounding the execution of the contract to evince the contrary intenti , it will in general be construed to be a continuing guaranty and operating until r voked, and the guarantor will be held liable to the extent of his guaranty, notwithstanding the principal debtor may have during the existence of the contract contracted debts to an amount equal to and greater than the sum named in the uaranty, and paid for the . The limit

mentioned in the guaranty has reference to the amount of the guarantor's liability and not the amount of dealing between the debtor and the one who gives the credit.

Ames v. Dodson, 24 N. Y. 64.
14 Neb. 158; 45 Am. Rep. 103.

(5) Where an instrument of guaranty contains a limitation as to the amount for which the guarantor will be bound and states that the guaranty is for goods to be furnished or advances to be made from time to time, the guaranty will be construed to be a continuing one and operating until the sums remaining unpaid reach the designated limit, even though the aggregate purchases far exceed it.

Douglas v. Reynolds, 7 Pet. 113,
Fisk v. Rickel (Iowa), 79 N. W. 120.

(6) Where the instrument of guaranty contains a limitation as to the amount for which the guarantor will be bound, and states that it is a guaranty for goods or money to be furnished the principal debtor at any time or at such time as the principal debtor may require, it will be a continuing guaranty.

Bent V. Hartshorn, 1 Metc. 24,
Pratt v. Matthews, 24 Hun 386,
Potter v. Green, 26 Kans. 252,
Michigan State Bank v. Peck, 28 Vt. 200.

THE FOREGOING RULES WILL AFFORD SOME AID in determining whether or not a particular guaranty is a continuing one, but in constructing a given guaranty it is frequently difficult to determine on which side of the line separating limited from continuing it belongs. THE INTENT OF THE PARTIES, to be derived from the words, is the only sure guide, and therefore little aid is to be derived from exemplifying cases, which necessarily turn upon the peculiar phraseology of particular guaranties. The aid which the cases furnish you will be simply by comparison.

THE COURT MAY BE AIDED IN ITS CONSTRUCTION of a guaranty by the fact that the parties have construed the guaranty themselves. If so - and by that I mean if they have acted upon it and by their acting upon it have given it a certain interpretation - the court will follow that intrepretation. This rule is not peculiar to the subject of collateral contracts, but applies to all contracts. The object of interpretation and construction of course is to get at the intent of the parties, as they express that intention. And this even to the extent of ignoring the ordinary construction of the terms in order to adopt the construction placed by the parties themselves upon the contract. In

Mason v. Pritchard, 12 East 221,

we find this rule: 'The words are to be taken as strongly against the party giving the guaranty as the sense of them will admit. The same rule has been adopted in

12 Wheat 515,
Douglas v. Reynolds, 7 Pet. 113,
Lawrence v. McAlmont, 2 How. 421,
142 N. Y. 207, 36 N. E. 880.

THE SURETY IS SAID TO BE THE FAVORITE of the law, and that means simply that he answers not for his own default but for the default of another. There is no moral obligation resting upon him aside from that which he has distinctly assumed. So equitable considerations are not brought into the contract against the surety or guarantor. Courts cannot say, "He ought to do this, and therefore we will stretch a point and make him do this." The point of this rule of construction is simply this: Do not presume anything against the surety or guarantor; do not create any obligation by way of implication; but when you find out what he has declared, them treat him just as you treat any other contractor, and in doing that you must give to words the strongest sense against them they will bear.

AN ABSOLUTE GUARANTY is an unconditional promise of payment or performance on the part of the principal. To bind the guarantor it is not necessary that there should be notice of acceptance of the guaranty or notice of default of the principal or that any steps should be taken to enforce the guaranteed contract against the principal. The guaranty may proceed at once against the guarantor on default of the principal . The guarantor's liability is dependedt upon the same rules of law by which the liability of one who has broken his contract is dependent. The most usual form of absolute guaranty is that of guaranty of payment.

THERE ARE TWO CLASSES OF GUARANTY, between which there is a fundamental distinction: (1) Guaranty of payment and (2) guaranty of collection.

(1) A GUARANTOR OF PAYMENT undertakes unconditionally that the debtor will pay. If the debtor makes default in payment the creditor may immediately on the default bring suit directly against the guarantor without taking any steps to collect from the principal debtor. The omission or neglect of the creditor or payee to bring suit against the principal debtor is not (except under special circumstances) any defense to the guarantor.

(2) A GUARANTOR OF COLLECTION undertakes that if the demand cannot be collected by proceedings he will pay it. E. g., 'I guarantee the collection of the within note.' This means that the guarantor will pay it if it cannot be collected by legal proceedings from the principal debtor. It follows that legal proceedings against the principal debtor and a failure to collect of him by those means are conditions precedent to the liability of the guarantor. Moreover, legal proceedings must be prosecuted with due diligence, or else the guarantor will be discharged from all liability.

McMurray v. Noyes, 72 Ill. 523.

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LECTURE V.

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On the other hand, a GUARANTOR OF PAYMENT IS LIABLE as a surety. He is not entitled to claim notice of the principal debtor's default. He is not entitled to proceedings being taken against the principal debtor to enforce the obligation, but immediately on the default of the principal debtor his liability becomes fixed. On the other hand, the guarantor of collection assumes this obligation: he will pay the obligation in case the principal debtor does not pay it at the end of all legal proceedings that can be taken against him. You must sue him, get a judgment against him, issue an execution on that judgment, have that execution returned unsatisfied before the guarantor's obligation begins; and that is true even though the principal debtor is known to be insolvent. All those steps must ne taken as conditions precedent to fixing the obligation of a guarantor of collection. Proper and seasonable endeavor to collect by legal proceedings is a condition precedent to a right of action against the guarantor.

Salt Springs Bank v. Sloan, 135 N.Y. 371; 32 N.E. 231.

The judgment must have been recovered without unreasonable del lay.

BETWEEN THE TWO EXTREMES

represented by a guarantor of collection and a guarantor of payment, the parties may by the terms of the contract create variations upon these general principles. The test to be applied in cases where by the terms of the contract it is uncertain whether it is a guaranty of payment or of collection, is to determine whether it is the guarantor's dut to take any steps against the principal debtor. Usually however the contract is so expressed as to leave little room for construction in that regard.

Case v. Schuman, 61 Hun 473; 16 N. Y. Supp 236.

THE TIME SET FOR THE PERFORMANCE of the undertaking may be limited too much to permit a suit to be prosecuted to judgment and execution. Such a case of course modifies the general rule. Bank v. Sloan, supra.

THE WAIVER OF LEGAL PROCEEDINGS may be fastened upon the guarantor of collection as well as any other contractor.

Mead v. Parker, 111 N. Y. 259; 18 N. E. 727.

In the case of one who INDORSES A NOTE BEFORE DELIVERY and so is a guarantor, no suit against the principal need be brought if he has not property enough to satisfy the judgment in full.

Gillespie v. Wheeler, 46 Conn. 410.

A GUARANTY OF PAYMENT IS A SPECIAL form of contract by which a guarantor renders himself liable under conditions other than those which according to general principles would be essential to establish his liability.

Roberts v. Hawkins, 70 Mich. 566.

ILLUSTRATIONS OF ABSOLUTE GUARANTY:

'For value received we guarantee

the within note until payment.' 'For value received I hereby guarantee the payment of the within note at maturity or at any time thereafter, and waive demand, protest and notice of nonpayment thereof.' 'For value received we hereby jointly and severally waive demand and notice of protest and guarantee the payment of the within note, and we hereby warrant the same collectible.'

SOME FAMILIAR EXAMPLES OF CONDITIONAL GUARANTY are those of the collectibility of a debt: a guaranty that a note is good and collectible, &c.

LETTERS OF CREDIT.

Anybody who indorses the liability or responsibility of a party to another - e. g., anyone who furnishes a letter to the country merchant going to New York to lay in a stock of goods - issues a letter of credit. A letter of credit is a writing addressed to one or more individuals or class of persons, or generally to any person, by which the signer undertakes to become responsible - either directly as a surety or collaterally as a guarantor, and either generally or specially - for payments to be made or credits to be extended to a third party named in the writing. The popular idea of a letter of credit is a means by which a traveler in foreign countries provides himself with funds. The traveler starting on his journey purchases from some bank or company a letter of credit which will enable him to provide himself with funds in the currency of the different countries through which he has occasion to pass. It is issued by some bank on a bank, say, in London, and it is simply a letter to that bank advising it to give on account of the drawer credit to the bearer of the letter to the amount say of 1,000 pounds. The man takes the letter with him; he puts on that letter his signature, and that signature is verified. He draws say 50 pounds in New York: he gets English currency. When he gets to London he simply goes to any bank and presents this letter: his signature is looked at but not scrutinized very closely, and the money is advanced to him and is entered upon the letter. Now the one who issued that letter is responsible to the parties who pay out the money, for the advances which they make.

Letters of credit are GOVERNED BY THE SAME LEGAL PRINCIPLES as other guaranties.

Bank of Montreal v. Recknake, 109 N.Y. 482, 7 N.E. 217.
Orr v. Bank, 1 Macq. (House of Lds.) 513.

THE ENGLISH CASES OF SOME YEARS AGO used to question the right of the party advancing money on the letter of credit to bring suit, on the ground that there was no privity of contract. But the contrary doctrine is settled in this country, on the theory that a general letter is addressed to any and every person and therefore it gives to any person to whom it may be shown authority to advance on this paper, so that it becomes in legal effect the same as if it were addressed to him by name. Union Bank v. Coster, supra.

SURETYSHIP DEFINED.

Suretyship is an undertaking to answer for the debt, default or miscarriage of another, by which the surety becomes bound as the principal or original debtor is bound.

Bouvier's Law Dic.

IT IS A PRIMARY OBLIGATION, and the creditor is not required to proceed first against the principal before he can recover from the surety. The surety and principal may be joined as defendants in one suit, or the surety may be sued alone without any effort having been made to recover the debt of the principal. A surety is one who binds himself with the principal as an original promisor, for the payment of some debt or the performance of some obligation of the principal.

HOW SURETYSHIP MAY BE CREATED.

(1) By express contract, and that constitutes the great class of contracts of suretyship. It may thus be created in any form of words which express the intention of the parties, but all the parties signing the obligation are principals unless it appears otherwise, or be shown by the express understanding of all the parties, to be the contract that the relationship of principal and surety existed between the makers of the instrument. One who engages to see that an existing obligation of another is performed is essentially a surety. In ordinary bonds for the payment of a debt or the performance of an obligation, it is generally pointed out with clearness which of the parties to the bond executes it as principal and which as surety.

(2) BY INDORSING OR SIGNING NOTES. That is to all intents and purposes an express contract, though nothing has been done but the indorser writing his name upon the paper. Indorsement of paper has two purposes: namely, the transfer of the title to the instrument, or for further security, or both. It is a contract of the law merchant. Effort is sometimes made by one who signs a note to limit his liability by adding to his signature the words 'surety' or 'signed as surety', but the addition of such words does not limit his contract or make his liability other than what it would have been had the words been omitted.

Dart. v. Sherwood, 7 Wisc. 523.

A note which on its face and standing alone APPEARS TO BE THE CONTRACT OF TWO JOINT PRINCIPALS may be shown by circumstances (which were part and parcel of the same transaction) to have been signed by one as principal and by the other as surety.

Divine v. U. S. Mortgage Co., 48 S. W. 585 (Tex.).
Wytheville Co. v. Frick, 30 S. E. (Va.) 491.

But where the payee of a note signed by two persons apparently as joint makers knew when the contract was made and when he received it that one of them was in fact only a surety, it is competent to show the fact in an action at law.

Barrin v. Cady, 40 Mich. 261.

(3) BY AN AGREEMENT TO ASSUME A MORTGAGE DEBT. The vendee of lands on which there is an existing mortgage may be

held as a principal debtor when he accepts a deed containing a recital that the grantee assumes the mortgage as a part of the consideration, or assumes and agrees to pay as a part of the consideration. Where a grant of land is made by such a conveyance the vendee becomes the principal debtor for the payment of the mortgage and the vendor becomes a surety. A stipulation in a conveyance of mortgaged lands that the vendee purchases subject to the existing mortgage, does not make the vendee a debtor of the mortgagee at all. He simply takes the land subject to the lien in the mortgage.

Crawford v. Evans, 33 Mich. 354.
Miller v. Thompson, 34 Mich. 10.

This obligation PASSES TO ALL SUCCESSIVE GRANTEES who accept a conveyance with an equivalent recital. In such a case all the grantees are original promisors, and the original debtor is a surety. The acceptance of a deed containing such a recital fastens the contract upon the grantee as effectually as if he had entered into it himself.

THE INQUIRY NATURALLY ARISES, how the grantor or grantee can be affected by the question whether one or the other is principal or surety? It may arise in this way: suppose a mortgage is foreclosed and the land fails to bring a sum sufficient to discharge the debt. The grantor makes up the deficiency. He cannot maintain an action for indemnity against the grantee on the recital in the deed, because the promiser does not run to him - it runs to the mortgagee. The grantor must in such a case resort to an action on the implied promise of indemnity which arises when a surety pays the debt of a principal.

Poe v. Dixon, 60 Ost 324.
Hill v. Wright, 23 Ark. 530,
Appleton v. Easton, 3 Metc. 169,
Holmes v. Wild, 19 Barb. 128,
Towne v. Goodrich, 2 Johns 213.

(4) BY MORTGAGE OF A WIFE'S SEPARATE PROPERTY to secure the debt of her husband. At common law the contract of a married woman was void. Her legal individuality was merged into that of her husband, her separate property was subject to his control. In most if not all states statutes have been enacted removing to a greater or less extent the common law disabilities of married women.

Mich. Compiled Laws, 1897, Chap. 233.

In some of the states she is prohibited from mortgaging her estate to secure her husband's debt; in others she is authorized to pledge her property for the payment of her husband's debt. Such is the rule in Michigan, but in Michigan she does not by that act incur any personal liability. She is prohibited from being a surety.

Watson v. Thurber, 11 Mich. 457,
Damon v. Deeves, 57 Mich. 247.

In other states, if the wife mortgages her separate estate to secure the debt of her husband, she becomes a surety merely,

and entitled only to the protection of a surety.
Bank v. Burns, 46 N. Y. 170,
Bank v. Lumber Co., 100 Tenn, 479, 47 S. W. 85.

WHERE A WIFE EXECUTES A MORTGAGE NOT TO SECURE HER HUSBAND'S debt, but to benefit her separate estate, she will not be regarded as a surety. Whether a contract executed by a married woman is one of suretyship or not will be determined by the consideration of whether or not it was made by her or on her behalf and upon the consideration moving to her or for the benefit of her separate estate.

TO THE EXTENT THAT THE CONSIDERATION WAS RECEIVED by her, or inured to the benefit of her estate, she will be held to have contracted as principal. To the extent that the consideration was RECEIVED BY HER HUSBAND or any other person, or that it went to pay his debt or liability, for which neither she nor her property was bound, it will be held a contract of suretyship.
Vogel v. Leitman, 102 Ind. 55.

(5) BY AGREEMENT OF A PARTNER to secure the firm debts. Where on the dissolution of a firm one partner agrees to assume the firm debts, the other partner becomes as to such partner a mere surety; both partners however, AS TO THE FIRM CREDITORS, are liable as principals, but if the firm creditors have knowledge of the agreement between the partners they must not lose sight of the surety's equities but must respect his rights. If, with full knowledge of the agreement between the partners, the firm creditors extend the time of payment to the partner continuing the business, the RETIRING PARTNER WILL BE DISCHARGED from liability.
Oakley v. Gilder, 10 Bly (H. of L. Cases) 548,
Colgrove v. Tolman, 67 N. Y. 95,
Palmer v. Purdy, 83 N. Y. 144,
Chandler v. Higgins, 109 Ill. 602,
Barbour v. Gilson, 18 Nev. (1 P.) 452,
Smith v. Sheldon, 39 Mich. 42.

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LECTURE VI.

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SMITH V SHELDON is one of the cases which have been the subject of frequent comment and perhaps of some criticism. The first point decided in that case (the opinion was delivered by Judge Cooley) was that a partner cannot after dissolution of the firm give a promissory note to bind the firm without special authority so to do. The second proposition was that in answer to the question: Were the partners who had retired from the firm under an agreement with the remaining partner that he should assume and pay the firm debts, entitled to the rights of sureties? It was distinctly held that under these circumstances the creditors were obliged to treat the retiring partners as sureties and to take no steps which would prejudice their rights in that regard. The third proposition was: Did the taking of the note by the creditor under the circumstances, being the note of the remaining partner alone, discharge the other partners from their former liability? The court held that with respect to that liability they were sureties for the remaining partner, and an extension of time relieved the sureties from their obligation.

It has been held IN OHIO that the retiring partner remains liable as principal to the same extent as if he had not retired and that the creditor is not bound to regard the equities of the retiring partners as sureties upon notes alone, unless the creditor distinctly assents to the new arrangements. You perceive that that amounts practically to a novation: the accepting of new debtors in the place of old.

A retiring partner occupying the position of surety, as already described, will be discharged from liability of the firm creditor has consented to take a less amount for the partnership debt and extended the time of payment thereof, under the Bankrupt Act.

Wilson V Lloyd, L R 16 Eq Cas. 60

The giving of time and the novation of the debt each operate to discharge the surety.

Can two or more principal debtors, by agreement among themselves without the consent of the creditor, so change the character of the liability of one of them to such creditor from principal to surety as to entitle him to demand from a creditor the treatment of a surety for a debt? Can a retiring partner become surety as to the creditor by simply informing him that his co-debtors have agreed to pay the debt? The question comes up frequently upon the dissolution of the partnership. It is clear that no arrangement among joint debtors can prejudice the rights of creditors unless the creditors consent to the arrangement or unless the creditors have notice of the agreement between the remaining and the retiring partners. If the creditor has notice of such an arrangement

he is, according to some authorities, compelled to regard the retiring debtors as sureties and must take no steps which will impair their liabilities as sureties. Equitably it would seem that such notice would impose upon a creditor the duty of acting in good faith and with reasonable diligence in the management of the securities placed in his hands for the payment of his claim, in the prevention of liens and in the application of paym nts made. Equitably he should handle these securities in such a way as not to injure the parties who have retired from the obligation, under agreement among themselves. If so in the enumeration above, why should not the same thing be held in regard to prompt collection? Why should not the same rule be ap lied with reference to the individual responsibility of the parties as well as to the securities of those parties placed in the hands of the creditor for his protection?

THE AUTHORITIES ARE NOT IN HARMONY on this proposition. An authority entitled to great consideration is to the effect that mere notice to the creditor that an arrangement has been made by the principal debtors whereby one of them becomes surety imposes upon the creditor the duty to regard the equities and do no act jeopardizing the rights of the surety. Equally respectable authority, perhaps, is to the effect that mere notice to the creditor of an arrangement between the principal debtors themselves whereby one of them stands in the relation of surety to the debt, does not impose upon the creditor the duty to regard the equities of the surety or to take measures to protect himself in his rights as surety. THE DIVISIONS OF AUTHORITIES on this proposition is due, in a great measure, no doubt, to a lack of careful consideration and discrimination of the facts. It lies largely in the difference, I think, of what is held to amount to consent as dictinguished from mere notice.

Colgrove V Tallman, 67 N Y 95

It is apparent, of course, that if the creditors agree to accept one of the firm as their debtor instead of the three members who originally contracted the debt, that of course discharges the other two, if the agreement is for sufficient consideration; but if the three partners make an agremeement among themselves and simply notify the creditor as to the arrangement, then the authorities on thatproposition divided as to whether the creditors must recognize the arrangement which those debtors have made amont themselves, one as a principal debtor and the other as sureties.

(6) PLEADING PROPERTY TO SECURE DEBT OF ANOTHER.

When property of any kind is pledged or mortgaged by the owner to answer for the debt, default or miscarriage of another, the property so pledged or mortgaged stands in the position of a surety or gurantor, and anything which would sicharge an original surety or guarantor on his individual undertaking will under similar circumstances discharge the property pledged or mortgaged. We have here the case of an intangible thing standing in the place of a guarantor or surety.

Dennison V Gibson, 24 Mich 187
Rowan V Mfg Co., 3 Conn 1
Kustner V Brown, 16 Io a 13

(7) BY ENTERING INTO A JOINT OBLIGATION.

Where several persons join in executing a bond or other obligation, they become sureties for each other. The law makes that contract; it springs from equitable principles, i.e., where two administrators join in a bond for the vaithful performance of their duties, or two persons purchase land and join in a bond for the purchase money.

Orne V McGee, 61 Ala 440

Where two persons execute a note and each of the receives one-half of the consideration, they are as betwe n themselves principals for one-half of the debt and sureties for each other for the other half.

Hall V Hall 34 Ind. 314
Bank V Clare, 76 Tex. 47; 13 S W 183

A joint maker of a note who has executed the note as a surety and not as a principal may, if this fact is known to the creditor, show by parol the circumstance of signing the note.

Hubbard V Grumby, 64 N Y 457

The same rule applies to instruments under seal; but in all such cases the creditor must have knowledge of the suretyship. If he has no knowledge of the fact when he took the instrument but is subsequently informed of it, he can do no acts which will prejudice the rights of the surety.

Oriental Cor. B Oberli , L R 7 Chan 142, 7 HL 138
Wheat V Kendall, 6 N H 504
Bank V Watson, 26 Mo. 243; 72 Am Dec 408

Ther is considerable disagreement among the authorities on the proposition as to WHETHER SUR TYSHIP CAN BE SHOWN BY PAROL under the circumstances just noticed. In some cases it has been held that suretyship under such circumstances cannot be shown by parol at law at all, but may be inequity.

The contract of suretyship is one of the oldest known to the law. It was known in the time of Solomon; the proverb runs, 'He that is surety for a stranger shall smart for it; he that hath suretyship is sure.'

Jon s V Whitehead, 4 Ga 397

REQUISITES OF CONTRACT OF SURETYSHIP.

These are identical with the requisites of other contracts. Contracts of suretyship and guaranty MUST BE IN WRITING: a rule which is to some extent special and must not be opposed to public policy: a rule in all respects general.

Ingersoll V Bacon, 41 Mich 48 } Void in contravention of
Bonyn V Dennison, 41 Mich 292 } mich. stat. of frauds.

THE ESSENTIALS OF THE CONTRACTS OF SURETYSHIP AND GUARANTY, as of other contracts, are: Competent parties, mutual assent, valid consideration and proper delivery.

(1) PARTIES.

Anyone competent to contract generally may enter into

a contract of suretyship or guaranty.

(a)- An Infant's relation to the contract of suretyship or guaranty does not differ from his relation to other business contracts. The contract is voidable but may be affirmed by him on attaining his majority andhaving (lawful) knowledge of the nature and extent of the contract, and once affirmed is irrevocable.

Reed V Lane, 1 Vt. 481; 17 Am 196
Home V Dimmel, 31 O St. 72

THE SUPREME COURT OF THE UNITED STATES had decided that an infant's contract is voidable only if it appears on its face to be to the infant's prejudice, in which case it is void.

McGreel V Taylor, 167 U.S. 688

b - AS TO PERSONS NON-COMPOS MENTIS: The rights and liabilities of an insane person who becomes surety are identical with the rights and liabilities as to other contracts. 46 2-62

c - MARRIED WOMEN: In some jurisdictions married women are specifically disqualified by statute frombecoming sureties. Barring these exceptional provisions, the same rules apply to their contracts of suretyship as their other contracts.

d - ATTORNEYS AT LAW: In all respects not affecting their professional relations, attorneys at law are competent to enter into a contract of suretyship. In most of the states the right of attorneys to become sureties on undertakings has been limited by statute or by rules of court. The limitation applies to practicing attorneys and extends to bonds required in legal proceedings and to bail or recognizance for the appearance of any person charged with crime. The statute of Michigan may be taken as a fair index of the statutory provisions in other states, but always consult your own statute. The Michigan statute reads: "No practicing attorney or counselor at law shall become security or bail for the appearance of any person charged with crime in any criminal action, and any such security or bail for appearance, taken by a judge, circuit court commissioner, justice of the peace or other officer authorized by law to take the same, shall be void."

C L 97, Sec. 1143

In other states the limitation has a wider range. In Nebraska, for example, the statute provides that no practicing attorneys shall be taken as surety on any official bond or bond in any legal proceedings in the district in which he resides.

The object of such legislation is manifest. It is based upon considerations of sound public policy: an attorney should never allow himself to be placed in the attitude of encouraging litigation, nor allow himself to become personally interested in the cause of his client by assuming any personal liability. In such a case a strong inducement is offered to take advantage of any undue advantage over his opponent. I quote that from Weeks on Attorneys, but personally I do not think that affects the attorney at all. The ordinary attorney is just as much interested as though he has a pecuniary interest at stake.

Such legislation is also for the attorney's protection but for such restraint he might, out of strong belief in the justness of his client's cause, assume liabilities that might become very embarrassing to him. Such statutes are generally held to be directory merely, and so if an attorney becomes surety notwithstanding the statute, he is bound by his obligation, because the consideration of public policy will not permit the attorney to plead his privelage after executing a contract of suretyship and causing it to be approved.

Weeks on Attorneys at Law, Sec. 119

Possi r V Crowle§, 22 N W (Neb) 422

It is held in Wisconsin, howeve', that an attorney does not become liable when he becomes surety contrary to the statute.

Cothren V Connaughton, 24 Wis 134

Hilbank V Stevens, 30 Wis. 155

Rules of Court limiting the rights of attorneys to become sureties in causes before them, are directory. Attorneys who become sureties in violation of such rules are liable on their obligations.

Conn Bros V Washer, 69 Tex 67 5 Am. St. Rep. 528

It has been the general rule in England since 1654 that attorneys can ot become bail, and this rule, with some variations, has been extensively adopted in America.

Mann V Nottage, 1 Young and J 367

Coster V Watson, 15 Johns. 535

(5) PARTNERSHIPS

are as competent to become sureties or guarantors as natural persons. The difficulties have arisen in cases where one of the partners signed the partnership name. The question thus raised is a question of agency. If he makes such a contract within the usual scope of the partnership business, the firm is liable on its contracts executed by a member of the firm and not by the firm itself. It would also be bound by a contract executed by one of its members who had special authority so to do. When made by one of the partners without authority, it is binding upon the firm if the other members afterward adopt it and act upon it. Generally, however, the rule is that one partner cannot usually bind the firm as sureties or guarantors for another.

McCune V Hamlin, 35 Pa St 517

Sutton V Irvine, 12 S.& R 13

Sweetser V French, 2 Cush 309

Osborn V Thompson, 55 Minn 229

Nothing said in this connection is to be understood to the effect that the partnership cannot by one of its members indorse or guarantee thepayment or collection of PAPER TAKEN IN THE COURSE OF ITS BUSINESS. A partnership has authority to do this, because it is an act within the scope of the partnership business; but a partner cannot by virtue of his partnership relation bind the partners by signing the firm name as surety or guarantor of paper not given in the course of the firm business.

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LECTURE VII.

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A GUARANTY SIGNED IN THE FIRM NAME AND ALSO BY each partner is held to be the contract of the partnership and also of each partner separately.

Ex parte Harding, L. R. 12 Chan. 577.

WHERE AFTER THE FAILURE OF THE FIRM ONE PARTNER GUARANTIES the payment of the firm obligations, such guaranty is without legal effect and does not even entitle the holder to prove the same against the separate estate of the guarantor upon a subsequent adjudication in bankruptcy. The reason is that he was bound anyway.

In re Blumer, 13 Fed. 622.

Cases involving the liability of partnerships on contracts of suretyship and guaranty are very numerous but will be found in the main to fall within the principles stated under this subdivision.

(6) CORPORATIONS.

The general rule is that a corporation has no power to become a guarantor or surety or accommodation indorser for another or others, or otherwise lend its credit to another person or corporation.

Thompson on Corps., Sec. 5721 and cases in note 5.

To this general rule there are certain exceptions: (1) TRUST AND GUARANTY COMPANIES, organized for the express purpose of becoming surety for other persons or corporations. These corporations are comparatively recent and are a very important factor in the conduct of business. (2) RAILROAD COMPANIES authorized to issue their own bonds for the construction of their road may guaranty the bonds of cities and counties lawfully issued to aid the construction of the road.

R. R. Co. v. Howard, 7 Wall (74 U.S.) 392,
Lawyer's Co-Op Ed. 19, p 117.
Arnot v. Erie R. R. Co., 5 Hun 608,
Taylor v. R. R. Co., 1 Lee (Tenn.) 186

(3) A BANK MAY GUARANTEE the payment of bonds pledged by its debtor to a third person as collateral security for money which the debtor pays the bank, even though the bonds have never been assigned to the bank.

Tallman v. Bank, 18 Barb. 128.

(4) CORPORATIONS MAY BE SO MANAGED and dealings so carried on as to hold them liable as sureties or guarantors where, but for the manner of management and dealings, they would not be competent to become sureties. For example, a lumber company lending its aid to establishing retail yards throughout its district for the purpose of increasing its trade. It may thus become surety for the rental of the grounds or for the cost of buildings put up by the yard proprietors, &c. Again: brewing companies establishing saloons and setting saloonkeepers

122 N.Y. 165

up in business to promote the sale of their beer or product.
Thompson on Corps., Sec. 5724, 81 N.Y. 449 466
Brewing Co. v. Flaherty, 137 Ill. 308; 27 N. E. 286,
Standard Brew. Co. v. Kelly, 66 Ill. App. 267.

THE COMPETENCY OF A CORPORATION TO BECOME A SURETY may be IMPLIED from the nature and conduct of its business and from what is reasonably necessary or proper to enable the corporation to accomplish any particular power expressly conferred. Thus a national bank may give a guaranty for the payment of a note to its indorsees in order to transfer the note, as such act is necessary to the carrying on of part of its business - namely, the discounting of commercial paper. No specific authority in bank act.

People's Bank v. Bank, 101 U. S. 181,
Thomas v. Bank, 40 Neb. 501; 58 N. W. 942.

(7) SURETY COMPANIES.

These are a creation of quite modern legislation. The statutes of the various states differ as to the terms on which corporations may be admitted to do business in the state, and the conditions under which any surety company may do business. A foreign corporation duly admitted to do business within the state is a competent surety on any bond on which two ordinary sureties are required; the same with a domestic surety corporation. 56 S.W. 972 72 Pac. 1032 33 S.E. 754

(8) PERSONS UNDER DURESS.

Persons executing the contract of suretyship under duress are not incompetent parties in the strict sense of the term, or even in the ordinary sense. They are not bound by the contract, because the contract is not their voluntary act, hence not their contract at all, and in that sense they are not parties to the contract. If the principal executes his contract under duress he is not bound; if the surety executes his contract under duress he is not bound.

Ingersoll v. Rowe, 65 Barb. 346.

But is a surety excused from liability on his contract in caseswwhere the principal has executed his contract under duress? Does the duress of the principal furnish a defense for the surety? Let us consider this under two heads: (1) Where the surety signs the contract with FULL KNOWLEDGE OF THE PRINCIPAL'S DURESS, the general rule is that the surety will not be relieved. 25 72 Mod 292 12 Cal 345

Plummer v. People, 16 Ill. 358.

There are however other cases which hold that the surety may be discharged on account of the duress practiced upon the principal.

Wilkinson v. Hurd, 65 Mo. App. 491,
State v. Brantley, 27 Ala. 44,
Hawes v. Marchand, 1 Curtis (C.C.A) 136,
Fed. cas. 6240.

We are not going to determine which of these two doctrines is the correct one. If the first doctrine is correct, may

it not lead to strange consequences? In a case where the surety pays the bond and comes back on the principal to indemnify him, the principal there would be liable on the principle of indemnifying the surety, when he would NOT have been liable on the original bond, and therefore he is held to a liability indirectly which could not have been maintained against him by direct proceedings. 21 Fed. 175 & 147

(2) Where the surety signs the contract IN IGNORANCE OF THE PRINCIPAL'S DURESS: here the surety will not be bound, because he has become surety on a contract which was notiin contemplation of the parties at the time of its execution.

Greer v. Marks, 98 Ga. 67,
Griffiths v. Sidgreaves, 90 Pa. St. 161.

DURESS IS A DEFENSE WHICH MUST BE PLEADED by him who is the subject thereof. This principle leads to the doctrine that the surety cannot take advantage of the principal's duress.

(9) NON RESIDENTS.

A non-resident will be bound on his contract of suretyship notwithstanding a statute which provided that non-residents shall not be accepted as sureties.

Carnegie v. Hurlbut, 70 Fed. 209.

The subject of the sufficiency and competency of nonresidents as sureties is REGULATED BY STATUTE. It is held in the federal court that the sureties on a receiver's bond need not be citizens of the same state in which the action is pending.

Taylor v. Life Ass'n, 3 Fed. 465.

SUFFICIENCY OF SURETIES.

Competency of sureties includes sufficiency. Sufficiency EMBRACES (1) pecuniary responsibility, which is frequently made to depend upon the surety's real estate alone; (2) residence within the state or municipality or jurisdiction of the court, (3) non-liability on other undertakings. The subject of sufficiency of sureties is controlled by statute and the rules of court enacted or adopted for the purpose of insuring adequate security for the undertaking. A surety on an undertaking to release attached property must in this state be a freeholder and a resident of the county. Sureties on liquor bonds must be male residents and freeholders of the township, village or city in which the business of selling liquor is proposed to be carried on. No one, whatever his pecuniary responsibility, is a competent surety on more than two bonds of this nature. ELECTIVE OR APPOINTIVE OFFICERS, other than notaries public, are disqualified as sureties on liquor bonds.

SURETYSHIP IMPLIED.

The contract of suretyship may be implied as well as expressed.

Dumont v. Williamson, 18 O. St. 515.

Where the vendor of a promissory note transfers it by indorsement without recourse, he is not liable under the law mer-

chant on any contract which he made, other than an implied contract, and in this case it was held that such an indorser impliedly guarantees the genuineness of the signatures of prior parties whose names appear on the note, so too a person not a party to a promissory note who does not indorse it, but who sells it and receives the money, impliedly guarantees the genuineness of the signature, and this too whether he receives the money for himself or for another. That is because the transaction is simply the selling of commercial paper, just like the selling of a horse, and while the indorsement without recourse relieves him of the liability of an indorser he is still liable on his implied warranty of genuineness of signature, just as the seller of a horse is liable on his implied warranty of the genuineness of the horse. Similarly a person who procures notes to be discounted at a bank impliedly guarantees the genuineness of the signatures of the makers and indorsers, and such person may be sued as the guarantor of the notes if the signatures are forged.

Bank v. Morton 4 Gray 156.

AN AGENT FOR THE SALE OF PROPERTY who has agreed not to sell for credit except to good and responsible parties and to take no debtor but on good collectible paper, but takes paper he knows to be worthless and turns it over to his employer or principal, who is ignorant of the character of the paper but takes it on his approval under that employment. is liable as a guarantor.

Clark v. Robbin, 26 Mich. 506.

SURETYSHIP CONTRACTS BY AGENTS.

The contract of suretyship, as well as any other contract, may be made by an agent, but the authority must be followed strictly in order to bind the principal. An agent's authority to execute the contract of suretyship must be conferred specially: general authority and general transaction of business, such as the writing of letters in the principal's name, collecting money and giving receipts for the same in the principal's name, indorsing bank checks, &c., does not embrace authority to bind the principal to guarantee the debt of a third person.

Stephenson v. Hoyt, 43 Pa. St. 191.

A GENERAL POWER OF ATTORNEY to transact business for the principal, sign his name to bonds, notes, &c., in connection with the principal's business, does not confer upon the agent authority to bind his principal as a surety on a bond not connected with the business of the principal.

Gates v. Bell, 3 Ha. Ark. 62.

STOCKHOLDERS OF A CORPORATION AS SURETIES.

Where the charter of a corporation makes the stockholders jointly and severally personally liable for the payment of all debts or demands contracted by the corporation (and that, by the way, is not a very usual form of corporation in these days), the stockholders have

been held to be principal debtors in their individual as well as their corporate capacity, and not sureities of the corporation nor discharged by time given it.

Harger v McCullough, 2 Denio 119
Moss v McCullough, 7 Barb 276

The liability of the stock holders for the debts of the corporation is imposed in various ways. For example, the stockholders of corporations under the manufacturing act of this state are liable for labor debts, but only as sureties. No laborer--No creditor for labor performed in this state on behalf of a corporation - can sue any of the stockholders of a corporation at first. He cannot hold them liable until he has exhausted his remedy against the corporation itself.

C L 97 sec 7065

In this state it is held, under the individual Liability Statutes that a shareholder in a bank occupies, as regards a creditor of the bank, the position of surety for the bank.

Grand Rapids Sav. Bank. v Warren, 52 Mich 557

MUTUAL ASSENT.

is the second requisite of the contract of suretyship. This requisites attaches to all contracts. The contract must actually be made, the minds of the parties must have met and each of the parties must have assented to the undertaking and this is all that is meant in this connection by mutual assent.

CONSIDERATION

is the third requisite of the contract of suretyship. Like all other contracts, the contract of suretyship or guaranty when not under seal must, as a condition of itsvalidity, be supported by sufficient consideration. Sufficient consideration is not synonomous with adequate consideration. Courts will not inquire into the adequacy of the consideration. Consideration as applied to the subject in hand is defined as something of benefit to the principal or something of detriment to the creditor. However inadequate the consideration embracing one or the other of these elements is, it will be sufficient to support the contract. When the consideration moves directly between the surety or guarantor and the creditor there is nothing exceptional to distinguish it from consideration of other contracts.

Leonard v Riedenburg, 8 Johns 29 43 Ky. 8 426 1 Ed. Book II p 326

THESE ARE THE FEATURES OF CONSIDERATION PECULIAR to the contract of suretyship or guaranty and necessarily peculiar because of the bringing in of a third party who assumes collateral obligations:

(1) What consideration moves between the principal and surety to support the undertaking of the surety? The implied promise of the principal to indemnify he surety for becoming a party to the obligation is a sufficient consideration as between principal and surety.

2-What consideration moves between the surety and creditor? In the first instance, the detriment arising to the creditor for parting with his money. I shall notice others further on.

SOME EXAMPLES OF SUFFICIENT CONSIDERATION:

A consideration of one dollar is sufficient to support a contract of suretyship or guaranty for any amount, for the law cannot take into account the prudence or imprudence of the bargain the surety has made.

Lawrence v McAlmot, 2 How (U S) 426
Co-Op Ed, Book 11, 336

You will find that contracts of suretyship are very often executed on an expressed consideration ofone dollar, the receipt whereof is acknowledged by the surety. Such an acknowledgement in the contract estops the surety from denying that the consideration named was paid to him.

The leaving of a claim in the hands of an attorney to control or collect is sufficient consideration for the attorney's contemporaneous guaranty of the claim.

33 Vt 405

The liability of a surety on a note is a sufficient consideration for his subsequent guaranty of its payment, whether at the date of the guaranty the right of action on the note has been barred by the Statute of Limitations or not.

Mills v Linnell, 97 Mass 298

The surrender of an old note or bond is a sufficient consideration to support the guaranty of a new one.

Churchill v Bradley, 58 Vt 403

Commissions allowed to an agent for the sale of property are a sufficient consideration for his guaranty of notes taken by him in payment.

Newton Wagon Co v Dyer, 10 Neb. 284

SOME EXAMPLES OF INSUFFICIENT CONSIDERATION :

The consideration on which the contract of suretyship is based must not be opposed to public policy. (1) Any consideration opposed to public policy or to statute is insufficient consideration. One who becomes surety for the payment of a note in consideration that the maker thereof shall not be prosecuted for a crime, is not bound by his contract.

Rouse v Glisman, 29 Ill App 321

One who becomes a surety on a note made to apublic officer for the private and illegal use or loan of public funds cannot be held liable on his contract, for the reason that it is in contravention of public policy.

Board of education v Thompson, 30 O St 321
Diebold v Okelman, 111 N Y 531, 19 N.E. 94

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LECTURE VIII.

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Implied promise of prin. to reimburse sur.:

2 - THE PROMISE OF THE SURETY that he will become guarantor on the obligation may be the inducement for the making of the contract on the part of the creditor. This is a sufficient consideration; in fact, when a contract is made on the inducement of the surety it is in the nature of an original promise, and the conside ation is not one necessarily peculiar to contracts of suretyship.

TO THOSE NUMBERED FROM 1 to 84 inclusive:

The county of Washtenaw has let a contract for the building of a jail and sheriff's residence. The contractor is an individual. He is to furnish all the materials and provide all the labor to complete the work. The Board of Supervisors requires of him a bond for the faithful execution of the work according to the contrat, and also the bond required by the Statute of Michigan (see first lecture) Prepare both bonds, with an individual as surety.

TO THOSE NUMBERED FROM 85 to 169 inclusive:

The city of Ann Arbor is letting a contract for the construction of anengine house for the Fire Department. The contractor is a corporation; it is likewise to furnish all the labor and materials for the completion of the work. Prepare the necessary bond, (1) for the faithful completion of the work; (2) to protect laboring men and material men.

TO THE REST OF THE CLASS:

The goverment of the U.S. through its proper officers and agents, is letting to a partnership a contract to add 100 feet to the pier in the Milwaukee Harbor. PREPARE THE NECESSARY BONDS to protect the goverment, and , in so far as the statute provides, to protect material men and laborers.

EXECUTORY CONSIDERATION TO THE PRINCIPAL.

Where the contract of suretyship is made contemporaneously with the contract between the principal and creditor, the consideration moving from the creditor to the principal is the consideration of the contract of suretyship; and where the promise of the surety is the inducement to the creditor to ent r into the original contract, such inducement will be sufficient consideration for the contract of suretyship when it is ifnally completed.

EXECUTED CONSIDER TION OF THE PRINCIPAL/

Where the original contract has been completed and the consideration has passed from the creditor to the principa l, a contract of suretyship subsequently made is without consideration except in cases where the original contract betwe n the creditor and the principal was made in reliance upon the prior promise of the surety; and it seems

that another exception should be made in cases where the contract between the creditor and principal was made at the request of the party who subsequently became the surety.

Paul v Stackhouse, 38 Pa St 302

AGREEMENT TO FORBEAR TOWARD PRINCIPAL.

Where a creditor promises not to pursue immediately his legal rights, that forbearance, coupled with the promise, is a good consideration for the contract of suretyship. It will support a promise by a third person to perform the undertaking in case the principal does not.

Sage v Wilcox, 6 Conn 81

Calkins v Chandler, 36 Mich 312

But the promise to pay the debt of another in consideration of forbearance is not binding unless accepted by the other. Mere forbearance is not enough: it must be in pursuance of a mutual agreement, the consideration being the promise for promise.

Shoot v Galbraith, 32 Pa St 312

4 - Delivery.

is the fourth requisite of the contract of suretyship. It will be treated here only in respect to those features peculiar to the subject under consideration. The contract of suretyship is not complete until the instrument by which it is created is delivered. If the maker of a promissory note delivers the note to the payee, who subsequently returns it, and the maker then procures the signature of a surety but does not return the note to the payee, the payee cannot sue the surety.

Chamberlain v Hauck, 8 Vt 94

The contract of suretyship takes effect only from the date of its delivery.

Hall v Parker, 37 Mich 590; 26 Am Rep 540

CONDITIONAL DELIVERY.

Vexatious, though perhaps not exceptional questions connected with delivery arise out of cases where one signs the contract of suretyship under oral agreement that the instrument shall not be delivered until others shall have signed the instrument as sureties. The defense is frequently urges in such cases that somebody was to be a co-surety has been left out - some fraud has been practiced upon the obligor. If there is nothing on the face of the instrument to appraise the obligee that it is incomplete for want of other signatures, or for anyother reason, or if the agreement between the co-obligors is unknown to the obligee, the delivery by the principal and co-obligor is a good delivery and the surety is bound although the delivery was m ade contrary to his understanding and contrary to his express contract.

Russell v Freer, 56 N Y 67

Dare v U S 16 Wall 1

Washington Probate Court v St.Claire, 52 Vt 24

BUT IF TI APPEARS FROM THE FACE OF THE INSTRUMENT, or the obligee has knowledge aliundo, that the instrument is not complete, the delivery is not good and the surety is not bound.

Thus where a note was conditioned that it wasnot to be delivered until signed by ten men of unqualified solvency, it was held that the sureties were not bound although the obligation was accepted in good faith with the signatures of ten men believed by the payee to be solvent, but not so in fact.

Campbell Pr.Press Co. v Powell, 78 Tex 53

WHERE THE DELIVERY IS MADE TO THE OBLIGEE BY A STRANGER to the instrument, the obligee is bound to inquire as to the conditions annexed to the delivery.

Nash v Gugin, 24 Grat 202, 18 Am Rep. 649

If one bound on a contract of suretyship hands it to another for the purpose of procuring the signature of another surety to the instrument, he may thereby constitute the person to whom he handed the instrument his agent for the purpose of delivery. That delivery is effectual under such circumstances has been held in

Cobbs v Johnson, 63 Mich 671

DELIVERY BY AGENCY applies to contracts of suretyship as well as to other contracts.

INCOMPLETE INSTRUMENT.

If the instrument creating the contracts of suretyship is incomplete and imperfect on its face and there has been a premature delivery without the fulfillment of the conditions stipulated by the surety, the surety is not bound.

Cutler v Roberts, 7 Neb. 4,

It frequently happens that a bond is presented to a surety for his signature where another is named as co-surety. The surety signing the bond will be bound aotho the other surety named in the instrument does not sign it, unless there is a stipulation that the instrument shall not be delivered until signed by both parties mentioned as sureties.

A surety is bound when he executes and delivers his contract altho his name does not appear in any part of the bond.

Bank v Atton, 119 Mass 146
Neal v Morgan, 28 Ill, 524

IF THE PRINCIPAL IS NAMED IN THE BODY OF THE INSTRUMENT BUT HE DOES NOT SIGN IT, it has been held that in some cases the surety is not liable. Authorities are not in harmony on that proposition, that he is not held liable se :

Goodyear Co v Bacon, 151 Mass 460
Johnson v Kimball, 39 Mich 187
Chink v Schll trustees, 16 Ill App 49

Contra: Parker v Brattle, 2 Hill 584
Leon v Stocker, 68 Pa St. 526 - See 226

FILLING IN BLANKS.

If the contract of suretyship is delivered without the blanks being filled and it is subsequently filled in by someone interested in it, the delivery is good. This rule applies to the same extent to notes or bonds and to the filling in of such blanks as dates, amounts and names.

(To be continued.)

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LECTURE IX.

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(Continued from Lecture VIII)

You will have noticed that all the differences between the requisites of the contract of suretyship and guaranty and the same requisites as to other contracts arises out of the fact that the contract of suretyship is IN A MEASURE TRIPARTITE: there are three or more parties interested in the subject-matter of the contract in different ways or degrees, and the purpose of the law in respect to the requisites is to guard with particular care the interests and rights of all the parties in interest. It is the province of courts to enforce the contracts which the parties make, and to that end rules have been established which have been brought to your attention for the purpose of enforcing by proper means the contracts which the parties have entered into.

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CONTRACT OF SURETY AND GUARANTOR AS AFFECTED BY STATUTE OF FRAUDS.

AT COMMON LAW the contract of a surety or guarantor might be oral. Keep this proposition constantly in mind. You will need to turn to it again and again to determine what construction you shall give to a certain contract or what liabilities the parties are bound to.

The Statute of Frauds was enacted in an age of corruption and demoralization. Fraud and chicanery were upheld in the courts by perjury and subornation of perjury. It was to remedy such mischiefs as were then prevalent that the Statute of Frauds was enacted April 16, 1677, and went into effect June 24, 1677.

The provision, embraced in Section 4, WITH WHICH WE HAVE TO DEAL, READS: 'No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith or some person thereunto by him lawfully authorized.'

Brown, Stat. Frauds, Appendix, 647.

The substance of this 4th section is enacted in all states, with one or two exceptions. It is expressed in the statutes of Louisiana just about the same as in the original statute.

Ex Maryland + New Mexico

IN MARYLAND AND NEW MEXICO the English statute is enforced as a part of the common law.

Subley v. Williams, 3 G & J (Md.) 62.
Childers v. Talbot, 10 P. (N. M.) 275.

IN PENNSYLVANIA the statute does not extend to promises involving not to exceed $20. IN DELAWARE it does not extend to promises where the debt does not exceed $25. IN IOWA the statute relates merely to the PROOF of the contract, which may still be enforced as against the party making it if not denied in the pleadings.

THE STATUTES OF ALL THE STATES USE THE TERM 'debt and default'. In that respect they follow exactly the language of the English statute. The term 'MISDOINGS' is used instead of 'MISCARRIAGE' in Massachusetts, Maine, Vermont, N. Y., Michigan, Minnesota, Virginia, West Virginia, Kentucky, Nebraska and Washington. PENNSYLVANIA omits the term altogether. When you are examining the question, always consult the statutes and decisions of your own state.

SOME OF THE STATUTES PROVIDE that the contract shall be SUBSCRIBED. The English statute says 'SIGNED'. What is a sufficient 'signing' has been the subject of a good many contests in court. In Michigan or in any state having a similar provision a signing is held to conform to the statute when the name is exhibited ANYWHERE WITHIN THE CONTRACT. E. g., 'I, J. B. Ferguson, promise,' &c., is just as good as if the name were written at the end. But where the statute requires a SUBSCRIPTION, then there must be a subscribing at the end.

The English statute provided that no action shall be brot (it does NOT PROVIDE THAT THE CONTRACT SHALL BE VOID) to charge the defendant, &c. The Michigan statute provides that every special promise to answer for the debt or misdoings, &c, SHALL BE VOID. There you have the two classes of statutes.

C. L. '97, Sec. 9015.

THIS DIFFERENCE IN PHRASEOLOGY leads to less important distinctions than would naturally be expected from such a seemingly radical difference in expression. The statutes of the following states are identical in legal effect with the English statute (with some unimportant verbal alterations):

Connecticut, Delaware, Florida, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Missouri, New Jersey, New Hampshire, Ohio, Tennessee, Pennsylvania, Texas, Rhode Island, Virginia, Vermont, West Virginia, Arkansas.

STATUTES HAVING THE MICHIGAN TYPE are those of Alabama, California, Iowa, Minnesota, Nebraska, New York, North Carolina, Oregon, Wisconsin.

CONSTRUCTION OF THE STATUTE.

(1) What is meant by the words 'No action shall be brought'? What is their effect? The contract is just as legal after the enactment of the statute as it was before, but it cannot be enforced. The parties to an oral contract of suretyship or guaranty may voluntarily perform their obligations, though they could not be compelled to do so.

Wain v Walters. Hertz
W.S.W. 6 of East 10 Smith Landing Co.
~~Wayne v Walters~~
~~Contracts~~

Beal v. Brown, 13 Allen 114. (1886)

IN MOST CASES THE PROVISION that 'no action shall be brot' amounts to the same thing as if the contract had been declared illegal. The exceptions are rare and unimportant and do not affect the questions of suretyship and guaranty. When the contract has been executed on both sides the statute will not affect the relation of both parties.

Stone v. Dennison, 13 Pick. 1.

A surety or a guaranty bound only by an oral promise may respect his obligation and RESPOND TO ITS MORAL REQUIREMENTS. He may pay the debt in case his principal does not, and RECOVER THE AMOUNT so paid from his principal. But money paid by a surety or a guarantor under an oral promise CANNOT BE RECOVERED BACK BY HIM FROM THE CREDITOR.

Shaw v. Woodcock, 7B & C 76. 7 Metcalf 224.

McCune v. Smith, 9 Minne. 252.

THE DISABILITY OR LIMITATION IMPOSED BY THE STATUTE OF FRAUDS DOES NOT EXTEND TO THE CONTRACT ITSELF, but to the means of enforcing it. It is the settled rule of construction, both in England and in those states which have adopted the same formula, that the statute does not go to the very substance of a contract, and render it a nullity, when not in writing: the STATUTE RELATES EXCLUSIVELY TO THE PROCEDURE, and simply furnishes a rule of evidence by which all agreements falling within its scope must be established. Thus, when the surety on an unwritten contract of suretyship pays the amount of the debt, the courts compel reimbursement from the principal debtor on whose account payment under the unenforceable contract has been made. The only exception to this general doctrine was noted in the case of an attorney who made a promise which by the provisions of the statute was unenforceable against him. The attorney promised that in case the plaintiff would stay proceedings in a certain suit he (the attorney) would give his promissory notes in payment of the judgment. This undertaking the court enforced by reason of its summary power over its own officers. Of course, had any but an attorney made the promise it would have been unenforceable.

In re Graves, 1 C & C 374.

THE PROHIBITION EMBODIED IN THE WORDS 'No action shall be brought' is against the remedy. Usually the courts of a country in which the statute prevails will not enforce the unwritten contract of suretyship or guaranty made in another country which was valid and enforceable in the country where made.

Leroux V. Brown, 12 C. B 801. (Jessel, C.J.)

Huber v. Steiner, 2 Scott 304.

TURNING NOW TO THE STATUTES OF THE MICHIGAN TYPE, where the provision is that certain specific contracts SHALL BE VOID unless in writing, it will be found that the changed phraseology has produced no important changes in judicial interpretation of the provision. The various doctrines and rules which

News contract.

M T G.

21 N.Y. 212 141 N.Y. 479 ex 141

88 Mich 342 ; 120 N.Y. 658 ex 157

English rule. To indemnify

8 B. & C. 728. overruled by 16 Q.B.D. 453

13 C.B. (new Ser.)

Agency Rule

145 N.Y. 446 ex 167

64 N.J.E. ex 169

have been adopted and enforced by the English courts have been generally adopted and enforced by American courts notwhitstanding the difference in expression. Especially is this noticeable in the equitable principle with respect to PART PERFORMANCE OF ORAL CONTRACTS. Now it would be absurd to say that you can enforce a VOID contract simply because the parties have performed in part. However the construction of statutes of the Michigan type is as to the remedy and not as to the contract itself. So, with respect to construction, there is very little difference between the expression 'No action shall be brot' and the term 'void'.

Pomeroy on Contracts, Sec. 70.

It has been held in Michigan that a contract void under the statute of frauds is a mere nullity and cannot be used for any purposes whatever. Still RECOVERY IS PERMITTED FOR SERVICES rendered on the strength of the contract. Not that the contract confers a consideration for those services, but that the services were rendered through it and the party is entitled to their reasonable value.

It has also been held in this state that a contract which CANNOT BE ENFORCED AS A CONTRACT CANNOT BE MADE THE FOUNDATION OF LEGAL OBLIGATIONS.

Scott v. Bush, 21 Mich. 421.

(2) What is meant by the words 'ANY SPECIAL PROMISE'? These words have been construed as equivalent to 'actual promise' or promise in fact made, and to exclude promise implied by law.

(3) What is meant by the words 'DEBT, DEFAULT OR MISCARRIAGE'? These words together comprehend every kind of liability enforceable by civil action. DEBT refers to a contract liability already incurred; DEFAULT to one to be incurred. Default has been held to refer to consequences arising from a tort as well.

Nathan v. Mount Stephen, L. 7 Eng. & Ir. App. 17.

MISCARRIAGE refers to that species of wrongful act for the consequences of which the law would make the parties civilly responsible.

Kirkham v. Marter, 2 B & A (1st Lecture)
Baker v. Morris, 33 Kans. 580,
Turner v. Hamill, 2 Day (Conn) 457.

THERE MUST BE A CLEAR ASCERTAINED LIABILITY OF A THIRD person for the debt, default or miscarriage - a liability capable of being enforced - as a basis for the contract of suretyship or guaranty. Without it there can be no contract of suretyship or guaranty.

Hooker v. Russell, 57 Wisc. 257.
Buchanan v Moran 63 Conn. 93.

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Memo.

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LECTURE X.

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(4) What is meant by the words 'of another person'? These words have given rise to a multitude of decisions. In Chapin v. Latham, 20 Pick 467., Judge Shaw said," The cases on this branch of the statute ofFrauds are so numerous that it would be a difficult task to review them, and the distinctions as to cases which are and are not within the statute are so nice and often so shadowy that it would still be more difficult to reconcile them. The contract which the statute has in contemplation is a contract of another person than the surety or gaurantor. If there be no contract of another person, there cannot be a contract of gaurranty or suretyship. Out of the construction of this phraseology of the Statute grows the DIRECT AND COLLATERAL PROMISE which must engage our attention before we can determine what contracts are within and what contracts are not within the Statute of Frauds.

THE TERM 'WITHIN THE STATUTE OF FRAUDS.'

You hear very frequently in the profession and in the Courts the term 'within the statute'. What is meant by it ? That is an expression concerning which you should get a clear conception at the outset, that expression is equivalent to the other expression 'that the statute applies'. In other words the statute of Frauds CONTROLS that particular transaction. 'This contract is subject to the provisions of the statute of Frauds' or falls within its terms' is also equivalent to 'within the statute'. Where the Contract is not affected by the Statute of Frauds it is said to be NOT within the statute. A fair and usual synonym for the term 'The contract is within the statute of Frauds' is 'The contract must be in writing.'

Of course, under the Fourth section, if the contract is an ORIGINAL undertaking the promise is not required to be in writing. Of course it might be required to be in writing under some other section of the Statute.

Whether a given contract is within the Statute of Frauds or not is to be decided, in the first place by determining whether the promise is original or collateral. A contract of suretyship cannot stand on its own feet; there can be no contract of suretyship unless there is a principal obligation. If the contract then, be original, it cannot be a contract of suretyship because a contract of suretyship is secondary. There can be no secondary contract without a primary obligation upon which it may rest. The contract of suretyship is a secondary contract IN THIS RESPECT ONLY: That it answers for some other persons obligations. It is primary in the sense that it may be sued upon by the person gaurranteed; he doesn't have to wait for the default of the principal in order to sue the surety.

IF IT IS AN ORIGINAL UNDERTAKING,

Of course it is not within the Statute. Now understand me to mean simply this 4th section of the statute. A contract for the sale of goods &c, might be within the statute (although an original contract) where a contract of suretyship is not involved at all. If it is collateral, of course it is within the Statute. In determining whether a promise is original or collateral it is important to inquire To whom was the credit given ? Who actually engaged in the undertaking? Whose undertaking was it ? If the credit was given to the promisor alone, the promise is original, not collateral and the promise need not be in writing. If the credit was given to a third person to any extent and the promise is collateral to the undertaking of the third person, it is within the Statute and must be in writing. Now the most obvious illustration of this proposition is where two persons come into a store and one of them says: 'Here is my friend who wants credit. Yous sell to him and if he does n't pay I aill'. There is a contract of suretyship, but the contract is void because oral. On the other hand had he said, 'You let this man have goods and charge it to me,' that is an original promise. That contract is not within the Statute; it is an original undertaking, not a collateral. Between those two extremes lies material for a multitude of cases.

It is of first importance to determine at the outset whether a given promise is original or collateral. If your advice is sought on the validity of a written contract, you determine first whether it is an undertaking independent of any other person's or whether it is collateral to an undertaking on someone else's part.

A goes into a wholsale house and buys a bill of goods and directs that the goods be shipped to him. This is a simple transaction between two persons only. On the other hand A. is interested in a mine as one of the principal stock holders. The mining corporation is indebted to A. for past advances and is entitled by contract to future advances. For the advances made and to be made the mining corporation turned over to A. a quantity of ore. One P was employed generally to take charge of the ore. A's oral promise to P in respect to his services in transferring the ore was, 'I will see that you get every dollar of your money; I will be personally responsible for the account; I will see that you are paid.' Here the question arises, was A's promise direct or collateral? If it was direct it binds him; if it was collateral it is unenforceable against him.

Davis v. Patrick, 141 U.S.,179; also in case book.

No general rule can be appealed to as a safe and consistent guide in determining whether a promise is original or collateral, although certain expressions have been regarded as fixing the nature of the promise. E. g., it has been held that a promise 'to be the paymaster' of one who should render services to another is original, while a promise to 'see him paid' is collateral.

Watkins v. Perkins, 1 Ld Rd 224,
Skinner v. Connaught, 2 Vt. 453.

It is not a general rule that the promise 'to see one paid' is a collateral promise. It is not a rule at all. I have mentioned this matter as a rule only because I wish to caution you against a statement that you will find in test books and in many decided cases, that a promise to 'see one paid' imparts a collateral undertaking. The most that can be said of a promise of this sort is that, standing alone, the words import a collateral agreement; but they are to be considered with reference to the conditions and circumstances surrounding their utterances.

Grant v. Wolf, 34 Minne., 32;
Mt. Stephen v. Lakeman, L R 7; Q B 196;
On Appeal 7 H. of L.

IT IS APPARENT THAT THE TEST TO BE APPLIED is not alone the language employed. That may be said of any contract. The expression used is only one element in determining whether the promise is original or collateral. Other elements are, the objects sought to be accomplished; the situation of the parties with respect to the subject matter; and the understanding of the parties to be gathered from their language and from their surroundings.

Davis v. Patrick, supra.
Elder v. Wardell, 7 H.& J. (Md) 397.

But CERTAIN FACTS MAY BE RELIED UPON AS FIXING THE NATURE OF the promise, even though they cannot be generalized into a rule:

(1) The test must be made as OF THE TIME OF THE GIVING OF THE CREDIT. If the entire credit be given to the promisor his promise is original. If any portion of the credit be given to the person for whom the benefit of the promise was made, the promise is collateral.

Cayhill v. Bigelow, 18 Pick., 369.

The MANNER IN WHICH THE TRANSACTION IS ENTERED UPON THE BOOKS of the creditor has an important but not a controlling interest in determining to whom the credit was given. Even a judgment against the creditor implied from an entry on his books may be explained and avoided by other circumstances.

The fact that a certain person is charged on the plaintiff's books with goods, is not conclusive evidence that credit was given to him; that the sale was made to him.

Swift v. Pierce, 13 Allen, 136,
Mount Stephen v. Lakeman, supra.

(2) If the promise HAS FOR ITS OBJECT THE DISCHARGE OF THE PERSON'S OWN OBLIGATION, it is an original promise. Whenever the main purpose and object of the promisor is not to answer for another but to subserve some pecuniary or business motive of his own, involving either a benefit to himself or damage to the other party contracting, his promise is not within the statute, although it may be in form a promise to pay the debt of another and although the performance of it may incidentally have the effect of extinguishing that liability.

Emerson v. Slater, 22 How. (63 U.S.), 28.

The real character of the promise, whether original or col-

lateral, DOES NOT DEPEND ALTOGETHER ON THE FORM of the expression, but largely on the situation of the parties; and the question always is, what the parties mutually understand by the language. They are bound by their agreement as gathered from the language employed; even though they may have intended otherwise.

The CIRCUMSTANCES SURROUNDING THE PARTIES AT THE TIME are to be taken into consideration to determine what their understanding was.

Davis v. Patrick, supra.
Keith v. Temple, 1 Bos. & Pul., 158.
Tilottson v. Nettle, 6 Pick., 509.

When it is once clearly determined whether the promise is original or collateral, the question in regard to the application of the Statute is eliminated.

The contract of SURETYSHIP IS FOUNDED on the liability of another; there can be no suretyship unless there be a principal debtor, who may be constituted in the course of the transaction though he may not have been so at the time; but still there is a principal debtor there can be no suretyship; nor can a man guarantee anybody else's debt unless there is a debt of somebody else's to be guaranteed.

Mount Stephen v. Lakeman, supra.

The prohibition of the statute runs only against the validity of an oral promise to answer for the debt, default or miscarriage of another. The statute does not apply then, unless the liability of the party for whom the guarrantor makes himself liable be a clear and ascertained legal liability, capable of being enforced against the party himself. Unless the promise is to answer for such liability of a third party, it is not within the statute and need not be in writing.

A PROMISE TO ANSWER FOR THE DEBT OF A MARRIED WOMAN is not within the Statute; it is good if oral; because the married woman at Common Law could not be made liable for her debts; in fact, could not contract at all. So that unless her Common Law disabilities have been removed by statute she cannot contract a debt, as that word is used in the statute of Frauds; but where a married woman or her separate estate is by law made liable for her debts the Statute applies.

Connell v. Newell, 7 Hill 116.
Miller v. Lund, 45 Pa. St., 350.

THE DEBT OF A MINOR is by the weight of authority such a debt as is embraced in the rule just given. It is a clear and ascertained legal liability. It is true that the minor cannot be compelled to pay the debt (unless contracted for necessaries) if he chooses to rely on his defense of infancy; and still the debt is only voidable at the instance of the infant. The defense of infancy is a personal defense, and cannot be assumed as between other parties, that the minor will avail himself of his defense of Infancy; therefore, a promise to answer for the debt of an infant is within the Statute. There is a debt of a third person, although that debt is subject to be avoided by the infant's personal plea of privilege.

Baxter v. Blanchard, 11 Allen 365.
Throop on Verbal Agreements.

If the obligation for which the gaurantor makes himself liable be a default as distinguished from a debt, the rule already quoted, (that the liability of a third party must be a clear and legal liability) is just as imperative. There can be no surety or guarantor of any short-coming on the part of a third person unless that short coming is equivalent to default , as that term is used in the Statute of Frauds. In order to make the statute apply, the default of the person assured must be such a default as is enforceable by legal action. That however applies more properly, perhaps, to the term 'miscarriage', the rule stated applies to miscarriages or misdoings as well as to debt and default. Unless some liability or duty of a third person exists or is to be created, there cannot be an agreement to answer for the debt, default or miscarriage of another.

Reed v. Lang, 1 Willis 305, (a leading case).

MISDOING following THE CONTRACT.

Suppose the contractors on the Engineering building have entered into an agreement to save harmless any person from any action which may be brought from any injury to any person resulting from the deposit of material or anything else connected with the construction of the building. There is an attempt to gaurd against a mis-deed that is to follow the assuring contract. Now the contract to guard against that mis-deed is just as good as if it were a past misdeed or a 'miscarriage'. That is a contract very frequently exacted in private buildings and in public works.

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LECTURE XI.

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We are speaking of the DIRECT AND COLLATERAL PROMISE. The collateral promise is the promise of the surety or guarantor and it must be in writing because of the Statute of Frauds. The leading case on the subject of direct and collateral promise is

Read v. Nash, 1 Wilson 305 (Prepare)

It is not necessary however that the PROMISE FOR WHICH THE ASSURING CONTRACT STANDS should be expressed; it may be implied. In fact every tort (or 'miscarriage') for which one answers, is implied; i.e., from certain facts there arises the liability of a tort-feasor. So it may be said that the obligation resting on third parties in cases of tort always arises by implication.

I will now direct your attention to SOME SUBORDINATE RULES deduced from the general rule already given, from the application of which it maythe more readily and certainly be determined whether a promise is within or not within the Statute.

You find the books full of cases in which PARTIES ARE AT VARIANCE as to whether a given contract constitutes an original contract or a collateral contract.

(1) IF THERE BE A REMEDY AGAINST A THIRD PARTY, or if an action would lie against him, the promise must be in writing in order to bind the promisor. If there be no remedy against a third party or if no action will lie against him, the promise need not be in writing. The debt, default or misdeed of the assured party must be such that an action can be maintained upon it, in order that the Statute shall apply. That is, when you speak of the 'promise' of another person, it must be such an promise as is enforceable in a court of law; it must be such an undertaking as will support an action. So if the debt of another person be not such a debt, or if the default be not such a default, or if the misdeed be not such a misdeed, as will support an action, then of course the promise to answer for it is not within the Statute. And so the common law and not the Statute applies. 2 Ld Raymond (1810s) Cs 173

IF HOWEVER THE SUBJECT-MATTER out of which the undertaking grew, affords a right of action against the assured, the assuring contract is within the Statute the same as if the contract itself had furnished a right of action.

Buckmeer v. Darnell, 2 Ld. Raymond 1085.
3 Saltell 15; Holt 606; Casebook 181.

EVER SINCE THE CASE was decided it has been regarded as settled doctrine that when no action will lie against the party undertaken for, it is an original promise. In that case the

case the defendant requested the plaintiff to let a third person have the plaintiff's horse, and promised orally that the third person would return the same. The third person did not return the horse. The question was, was the defendant liable on his oral promise ? The horse was lent wholly upon the credit of the defendant, but not withstanding this the Judges were all of the opinion that the case was within the statute, because even if the third party was not chargeable in action upon the promise he was chargeable on the bailment in detinue on the original delivery, and inasmuch as the party undertaken for was chargeable in an action for the unlawful taking of the horse, the promise of the defendant was collateral.

THE PRINCIPLE THEN MAY BE STATED THUS: If the cause of action against a third party HAS ITS ROOT in the transaction, it is sufficient to charge the party, third party, with liability.

Means v. Wagner, 1 Lacord 395; Casebook 183.

THE AFFIRMATIVE BRANCH OF THE RULE under consideration, namely where an action will lie against a third party is illustrated in ,

Hooker v. Russel, 67 Wis. 267; Case book 148.

(2) IF THE ORIGINAL DEBT IS EXTINGUISHED:

Or novation ensues from the promise, the promise need not be in writing. The promise under such circumstances is not to pay the debt of another, which has accrued, but it is an original contract upon good consideration.

BUT WHERE THE ORIGINAL DEBT STILL SUBSISTS and where the promisee has relinquished no interest in his claim against the promisor, it is not an original contract but a contract to pay another's debt, and must be in writing.

(3) A PROMISE BY ONE PERSON TO IDEMNIFY ANOTHER FOR becoming the guarantor of a third person, is not within the statute.

Jones v. Bacon, 145 N.Y., 446.

(4) THE PROMISE TO PAY THE DEBT OF ANOTHER, to come within the Statute must be to the creditor and not to the debtor. A promise to the debtor himself to pay his debt is not within the Statute.

Eastwood v. Kenyon, 11 Adol. & E., 438.
Eng. C. L. Rep. 137; Case book 174.

THE RULE FINDS FREQUENT AND VARIED ILLUSTRATION in those cases where a person buys lands or goods and agrees to pay the purchase money to the creditor of the seller, or as part of the consideration assumes a mortgage or other indebtedness of the seller. This is no more than a promise to pay the promisor's own debt, in a particular way, and it is within the statute.

Price v. Reed , 38 Mo., App., 429.

This was an action upon a promissory note executed by one W to plaintiff to secure which W. undertook to execute a deed of trust on certain real estate, which thru mistake of the scrivener, was inaccurately described. Subsequently W. sold said real estate and, by deed of general warranty, conveyed the same by correct description to defendant. As part of the consideration defendant assumed the

payment of said note to plaintiff. Afterward defendant sold said real estate. The question of fact submitted to the jury was, did the defendant as part of the purchase price of the land promise and agree to pay the note of 1200 made by W. to the plaintiff? The Jury found the issue for the plaintiff.

Having made the promise in this way the defendant was bound by it. It was nothing more than a promise to pay his own debt in a particular way.

THE PRINCIPLE WHICH IS HERE UNDER DISCUSSION is one which is met with every day in the business world.

One buys a farm on which there rests a mortgage He agrees to assume that mortgage. Now in the first place, or in one view, he by that means is answering for the debt of another, or in other words he is taking upon himself the obligation of another. A mortgage is made by A, B promises to pay it. Of course that transaction in respect to land would have to be in writing but not necessarily so in respect to chattels. In that case, or in such cases it is readily seen that such a promise is a promise of the vendee to pay for the property sold to him. A part of that payment is made by discharging an obligation which rests upon him or upon the property as a lien. Primarily of course it is the debt of another person, but it constitutes A PART OF THE CONSIDERATION which the vendee agrees to pay for the land or the property.

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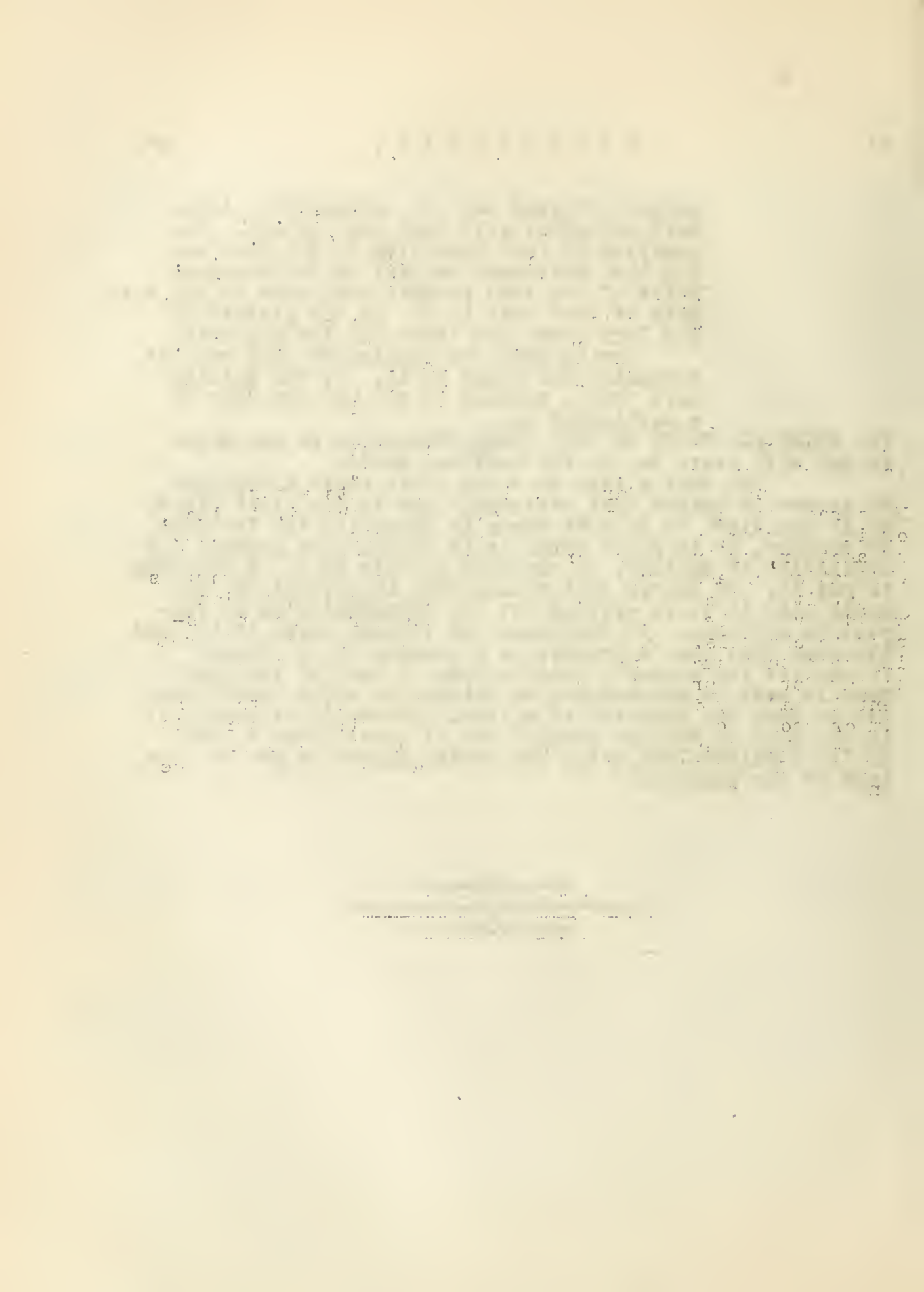

LECTURE XII.

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I was just using the illustration where one as a part of the purchase price pays the debt of another person, and I had cited one illustration as to a real estate transaction. The other one that I spoke of was one with reference to personal property. A case illustrating that feature of the subject is

Bank v. Studeman, 74 Iowa, 104, 37 N.W. 112.

In that case one I purchased cattle from the defendant. A part of the consideration was that the defendant assumed and agreed to pay to third parties in Chicago a debt of the vendor to the amount of $500. The plaintiff attached the cattle and garnished the vendee I. Plaintiffs claim was that the contract, so far as it required the vendor to pay anything to the Chicago parties, could not be enforced because, being an agreement to pay the debt of another, it was in the Statute of Frauds and, not being in writing, was void. The court held that the obligation of the vendee to pay the $500 was an original undertaking on his part, entered into for his own benefit. You see this promise was not made to the creditor, it was made to the debtor and falls among that class of cases of which Eastwood v. Kenyon is the leader. It was held that this promise was not only NOT within the statute of Frauds but was a contract which the creditors could have enforced against the vendee by direct proceedings. To the same effect is

Delt v. Brewing Co., 123 Pa St 42; 15 A871.

This kind of a transaction MUST NOT BE CONFUSED WITH THE PROMISE TO PAY THE DEBT OF ANOTHER. It is rather a promise to pay one's own debt to such person as the Creditor may direct. But does this promise give the Creditor, to whom it is not made a right to bring an action on the promise ? In certain cases it does-- in cases where the promise to pay the debt of a third person rests upon the fact that money or property is placed in the hands of the promisor for the particular purpose; also where one buys out the stock of a tradesman to take the place fulfill the contract and pay the debts of the vendor; in such cases a direct action by the creditor will lie. These cases, as well as the cases where one receives property or money on the promise topay or deliver to a third person, are cases in which the third person, altho not a party to the contract, may be fairly said to be a party to the consideration on which it rests.

A PROMISE TO IDEMNIFY OR SAVE HARMLESS from any liability which he may incur as the result of the transaction into which he enters at the instance of the promisor (as in the case of idemnifying the promisee against loss from going bail for another), is NOT WITHIN THE STATUTE.

Anderson v. Spence, 72 Ind., 315.
Beaman v. Russell, 20 Vt. 205;
Berry v. Ranson, 12 N. Y., 462.

A PROMISE MADE TO THE DEBTOR TO IDEMNIFY HIM AGAINST any

claim arising from his debt is NOT WITHIN THE STATUTE. where the promisor does not become liable to the creditor.

Calkins v. Hopkins, 17 Johns 113,
Wells v. Nockels, 17 Pa. 538.

It is nothing more than a promise to pay a prospective debt to the promisee. In some, if not most of the books, it has been sought to distinguish between contracts within the statute and contracts of idemnity, by saying that, without qualification the promise of idemnity is not within the statute; but this may mislead. Such a promise to idemnify the promisee against any liability which he may incur, is not within the statute, but it is otherwise where the promise is to idemnify the promisee against any loss which he may sustain by reason of the default or miscarriage of a person under liability to him.

Mallory v. Gillett, 21 N. Y. 412.

IN JURISDICTIONS WHERE ACCEPANCES OF BILLS OF EXCHANGE are not required to be in writing, or the statutes do not otherwise modify the common law, parol acceptances, assented to by the holder, are permitted.

THE PROMISE MUST CONTEMPLATE payment by the promisor out of his own property or at least, not out of the property of the debtor.

Mallory v. Gillett, 21 N. Y., 412;
First Nat. Bank v. Chapman, 144 N. Y., 532.

It is obvious that the payment of a third partys debt out of the property of the debtor would not be answering for the debt of another person. The debtor would be answering for hisown debt thru the special agency of another. If the promise be to pay the debt of a third party out of the third party's property or the proceeds thereof, it is not within the statute. It is manifest that if the debtor furnishes the means to discharge his debt, no OTHER person is required to pay the debt FOR him; also that if the debtor, instead of paying the creditor with his own property or the proceeds thereof, turned out the property to another with the understanding that such person would pay the debt with such property or the proceeds thereof, he is simply providing a way to pay his own debt out of his own property.

If the PARTY WHO RECEIVED THE PROPERTY OR THE PROCEEDS thereof thereupon promises to pay the debt, he becomes an original promisor and his promise is based upon an sufficient consideration. The original debtor is not liable on that promise, nor is any person liable thereon other than the promisor himself.

Williams v. Leper, 3 Burr 1886,
Crawford v. King, 54 Ind., 6,
Templeton v. Baston, 33 Vt., 132.

THE PROPERTY MUST NOT ONLY BE TURNED OUT TO PAY THE DEBT but it must be in control of the promisor , to be used - capable of being used - for the purposes designed. It is not enough that the promisor is the agent of those who do control it; he

must hold the property or money in his individual capacity, not in a representative capacity.

Flynn v. Hammill, 1 Hill 82.

A promise to pay the debt of another is not within the statute IF ITS CONSIDERATION WAS THE ABANDONMENT TO THE promisor of security for the payment of the debt consisting of a lien upon or interest in the property to which the promisor then had a subordinate lien.

1 Throop, Verb. Agreements, p 156.
Crawford v. King, supra.

(6) REPRESENTATIONS AS TO ANOTHER'S CREDIT

are not within the statute. This proposition has been a fruitful source of contention and trouble. Independent of statutory enactment, it is settled that false and deceitful representations as to the standing and responsibility of a third person are not within the statute. Such representations cannot be held to be a special promise to answer for the debt of another. The leading case is

Haisly v. Freeman, 3 Crown Reps. 51 (1789);
S. C. II Smith's L. C. p 133.

STATUTORY ENACTMENT HOWEVER HAS TAKEN CARE OF THAT SUBJECT, and it is now a matter of statutory regulation in England and in many (perhaps all) of the states. The statutes are substantially the same and provide generally that no action can be brot (by the person to whom the representation is made) to charge the person upon or by reason of any representation or assurance concerning the character, conduct, credit, or ability, trade or dealings of any other preson, unless such representation, &c, be in writing and signed by the party to be charged, thereby or by some person thereto by him lawfully authorized.

Stimp. Amer. Stat. Law, Sec. 41-46.

THE EFFECT OF THESE STATUTORY ENACTMENTS IS TO MAKE an addition to the statute of frauds.

(7) IF THE ORIGINAL PROMISE WAS IN WRITING,

an oral promise made subsequently is sufficient to take the case out of the statute of limitations.

THE FORM OF THE WRITING

should comply with the provision of the statute, which is 'unless the agreement or some memorandum or note thereof be in writing.' This does not require formalities; it does require that the real transaction shall be substantially expressed. A letter, receipt, order, return of a sheriff on execution; vote of a corporation entered on its books - each has been held sufficient. It may be on separate pieces of paper, but the several papers must on their face refer to each other and make the transaction complete. Sometimes the writing required, for example, to create a trust, has been supplied by the ANSWER OF THE DEFENDANT IN A CHANCERY PROCEEDING; i. e., the pleader has acknowledged in his answer the existence of the trust which did not appear in any other way or form. So be careful as to what you admit by your pleadings.

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LECTURE XIII.

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CONSTRUCTION OF CONTRACT OF SURETYSHIP. The contract of suretyship is always construed strictly in favor of the surety. The obligation of a surety growing out of his undertaking cannot be extended by implication nor his liability enlarged beyond the terms of his contract. To the extent, in the manner and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient to say that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has the right to stand upon the very terms of his contract, and if he does not assent to a variation of it and a variation is made, it is fatal. Courts of equity as well as Courts of law have been in the constant habit of scanning the contracts of surety with strictness.

Miller v. Stewart, 9 Wheaton, 660,
Ulster County Savings Institution v. Young,
161 N. Y., 23; 55 N. E., 483.

This latter is a good case, which I should like to have you examine.

IN DETERMINING THE SCOPE AND EXTENT of the contract of suretyship and the liability of the surety, it is necessary to bear in mind these two principles; (1) The contract of the surety is strictissimi juris: (2) The surety is a favorite of the law.

WHEN IT IS SAID THAT THE CONTRACT OF SURETYSHIP MUST BE CONSTRUED STRICTLY it is not meant that the rule operates to relieve the surety from any obligation he has actually taken upon himself. The question is, what obligation has the surety assumed? That is to be determined from his express undertaking. He is not bound to any implied promise. No far fetched equities nor overstrained constructions are allowed against him.

Ryan v. Williams, 29 Kans. 487.

He is not to be made liable for any undertaking which he has not definitely and expressly assumed. The contract which he enters into is NOT LOOKED UPON WITH DISFAVOR BY THE LAW. It is a legitimate and highly important undertaking--an undertaking which will be enforced according to its terms; but it must be born in mind that the contract of the surety is to answer for some others shortcomings or defaults. No moral obligation is held to rest upon the surety to answer for such shortcomings or defaults. His obligation is strictly legal and is to be limited to undertakings to which he has expressly and definitely assented, which undertakings are to be drawn from his written contract, but by the SAME STANDARDS OF INTERPRETATION applied to other contracts.

There is not one rule for the interpretation of the surety's contract and another for the principal's. They are intrepreted by the same standard precisely, although one is the favorite of the law and the other takes his chances. The rule before us is not understood as opposed to the rule in,

Madison v. Pritchard, 12 East 227.
Drummond v. Preston, 12 Wheat 515.

heretofore cited, to the effect that the words are to be taken as strongly against the party giving the guarranty as the sense of them will permit. This latter rule does not militate against the rule of strict construction, nor permit the surety's liability to be enlarged by implication.

THE RULE AS TO THE CONSTRUCTION OF THE CONTRACT of suretyship may be stated thus: Interpret it just as you would anyother contract; CONSTRUE it - when it becomes necessary to draw the line of favortism or the ppposite - favorably to the surety. Apply to the interpretation of the surety's contract the same rules you would apply to the interpretation of anyother contract, and when the meaning of the language has thus been ascertained, the responsibility of the surety is not to be enlarged by implication or by construction.

People v. Bacus, 117 N.Y. 196; 22N.E. 759; Cases 134.

IF THE PHRASEOLOGY OF A CONTRACT OF GUARANTY OR SURETYSHIP is so ambiguous as not to furnish conclusive evidence of its meaning, light may be sought from extrinsic circumstances.

Evansville National Bank v. Kaufman, Cases 64.

That rule of course is in harmony with the rule of construction of any contract.

IF AS THUS INTERPRETED THE CONTRACT IS STILL FAIRLY OPEN TO DIFFERING CONSTRUCTIONS, it is to be interpreted most strongly against the surety or guarantor, because it was he who adopted the phraseology.

Hargreave v. Schnell, 6 Bingham, 244.
Smith v. Mollison, 148 N.Y. 241; 42 N.E. 669; Cases 104.

The general rule of strict construction is drawn from adjudications to numerous and varied to be mentioned. The cases apply to almost every variety of circumstances. We shall be able to refer to but few, and those very few in the most general way as illustrating some of the general principles.

(1) AS TO THE SUBJECT MATTER OF THE UNDERTAKING. The liability of a surety is limited to the subject matter of his undertaking, and the subject-matter cannot be enlarged. That rule is well illustrated by

Ward V. Stahl, 81 N. Y., 406.

THE LANGUAGE OF THE RECITAL CONTROLS the condition. The condition must not be larger than the recital.

Tradesman's Bank v. Woodward, Anthon (N.Y.) 300.
National Banking Ass'n. v. Cochran, 19 N. Y., 116.
A. D. T. Co., v. Lenning, 139 Penn. St. 504.

WHERE THE CONDITION OF THE BOND IS LARGER than the recital, the effect of the recital is to restrain it. The rule is otherwise in the case of deeds, and is referred to for the purpose of emphasizing the rule that the obligation of the surety is not to be extended beyond the terms of his contract.

Huntingford v. Mumford, 5 Johns, 22.

See further as to limitation of surety's undertaking to the precise subject matter of his undertaking:

W. S. Mining Co., v. Hines, 61 Mich., 423.

Pond v. Delanois, 113 Mass., 394.
State v. Hinsdale, 117 Ind., 476.

The rule operates to relelve a surety from liability where he has undertaken to pay for the different kinds of goods to be sold on a credit of six months and the goods are sold, one kind on a bredit of six months and the other kind on a credit of four months.

Leeds v. Dunn, 10 N. Y., 469.

We may conclude on this subdivision with the statement that the obligation of a surety is not to be extended to any other subject than is expressed or necessarialy included within it.

IN DRAWING BONDS YOU SHOULD BE VERY CAREFUL to see that nothing by way of recital is incorporated within the bond to limit the effect of the condition as you desire it to stand.

(2) AS TO THE PERSON UNDERTAKING. We have seen that when a surety undertakes to answer for one person his obligation cannot be extended to answer for another person associated with him in the venture; but the mere fact that another party has joined with the party undertaken for in the disposition of goods covered by the guaranty does not relelve the guarartor from his undertaking.

Palmer v. Bank 56 N. Y. 523.

(3) AS TO THE PERSON TO WHOM ASSURANCE IS GIVEN. Where a contract of guaranty is made with a particular person, that contract cannot be extended to other persons even if such other persons compose a partnership of which the surety is a member.

Burns v. Barrell, 61 N. Y., 39; 19 Am Reps 247.

And so it is settled that the obligation of a guarantor or surety is not to be extended to any other person than the one named or expressed in the contract. This, you see, is in line with the general rule of strictissmi juris.

(4) AS TO THE TIME within or during which the contract operates. The contract of suretyship is always prospective unless it appears that past defaults are undertaken for. The contract will not be construed to operate retrospectively unless a clear intent to that end is expressed. Where an instrument recites that a duty to be performed by the principal shall be performed within a specified time or period, the surety will be liable only for default occuring within that period.

(5) AS TO THE CAPACITY in which the person undertaken for is to work. Where a surety undertakes to answer for the faithfuh performance of the duties or of an office or employment and the duties and responsibilities pertaining to the office or employment are by the obligee materially changed, his undertaking cannot be extended to the changed or enlagged position.

A. D. T. Co., v. Lenning, 139 Pa. St. 594.

But the surety will not in general be releived from responsibility because the act of his principal which covered the loss was not strictly in the line of his duties of his office or employment or was done in the course of a temporary or causal performance of other duties at the request of his employer.

German Bank v. Alf., 87 Pa. St. 419.
Detroit Bank v. Zeigler, 49 Mich. 157.

(6) AS TO THE AMOUNT fixed by the surety as the extent of his liability. It is a familiar doctrine that the surety is not

bound be-ond the penalty of his undertaking.

COURTS OF EQUITY CONSTRUE THE CONTRACT of suretyship on the same lines as courts of law, but where the contract does not express the intention of the parties and that fact is made clearly to appear, equity will reform the contract, against the surety as well as against the principal, and it will do that even tho the surety is not a party.

Olmsted v. Olmsted, 38 Conn 309,
Burd v. Radcliffe, 6 Johns Chancery 302.

WHERE BY REASON OF SOME FRAUD OR ACCIDENT OR MISTAKE the legal remedy is lacking, equity will enforce the contract according to the obvious intention of the parties.

Brooks v. Brooks, 12 Gill & J. 306.
United States v. Brook, 2 Sumner 234.

(7) OFFICAL DUTY OF GUARRANTIES. Where a surety stands a s sponsor for official fidelity or for the fidelity of an officer his contract is construed strictly to apply to the conditions which existed at the time the undertaking was made.

I have referred only to some of these general instances as illustrations of the rules governing the construction of the contract of suretyship. These, which have been enumerated, are but types of many others all of which support the rule of construction announced at the outset- that the contract of the surety is strictissimi juris. Another proposition was announced, namely; that the surety is a favorite in the law. This proposition results from the application of rules, out of which grows the general rules. The surety is a favorite of the law because he is under no moral obligation to pay the debt of his principal; because nothing is implied against him; because he is permitted to stand on the very terms of his contract, on the strict terms of his obligation, on the very letter of his contract. And it makes no difference whether a modification of the contract would result to HIS ADVANTAGE OR TO HIS DISADVANTAGE: He has a right to stand upon the very terms of his contract. Not because his undertaking to answer for anothers default is regarded with particular favor (because as we have seen, courts, and the custom of business expect that; it is expected that one man stand for the sponsor of another.); not because of the language he has made use of to express his obligation, for that language is to be interpreted by no other standard than is applied to any other contract. But IT IS BECAUSE inasmuch as he is to answer for an obligation not his own, the courts indulge him to the extent of saying that nothing shall be implied against him but that he shall perform only that contract which he has undertaken to perform, which is not supported by any moral consideration but is supported by a consideration purely legal, and that his obligation is not equitable but purely legal.

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LECTURE XIV.

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So far we have considered the surety from the standpoint of his duties and obligations - when he becomes bound, how he becomes bound, and the extent of his obligations. WHEN HE BECOMES BOUND relates to that part of the lectures which has referred to the manner in which the contract is intered into. HOW HE BECOMES BOUND relates to that part of the subject-matter of the lectures which has treated of the Statute of Frauds. THE EXTENT OF HIS ONLIGATION IS referred to in that part of the course already presented which involves the construction of the surety's contract.

We shall now consider THE SURETY FROM THE STANDPOINT OF HIS RIGHTS. Of these there may be mentioned the (1) right of SUBROGATION ; (2) the right of IDEMNITY; (3) the right of CONTRIBUTION from his co-sureties; (4) the right of EXONERATION. I shall not be able to present anything further to you by way of lectures than some general remarks upon the subjects of SUBROGATION and CONTRIBUTION.

EXONERATION, etymologically, means a 'lifting of the load'. As to suretyship, the application is simply this: The surety has the right under certain circumstances to compel the assured to get from the principal debtor that which the surety becomes responsible for; in other words, to ligt from his shoulders the load to answer for another person. If it be possible while the contract is in force for the surety to be exonerated - that is to be releaved of the burder which he has assumed - he may bring his appropiate action for that purpose, circumstances being favorable to that end.

(1) SUBROGATION is defined as the substitution of one person or thing for another so that the same rights and duties which attached to the original person or thing attach to the one substituted. Another definition is this: Subrogation is the substitution of another person in the place of a creditor or claimant, to whose rights he succeeds in relation to the to the debt or claim assigned, which has been paid by him, not voluntaialy, and contemplates some original privileges on the part of him to whose place substitution is claimed.

Am. & Eng. Ecyl. of Law., 1st Ed.
Kirkham v. DuPont, 14 Calif.565; 13 Am Dec. 297,note.

Take as an illustration THE CONTRACT OF INSURANCE. This is a contract of idemnity and being so the insured is entitled to be paid only once, and if he obtains payment of his loss from any other scurce he is not entitled to claims against his insurer. But the insurer on paying the loss is entitled to be put in the place of the insured; therefore if the insured had a claim which he might have enforced in respect to the property, e. g., against the person whose negligence or wrongful act caused the loss - the insurer will thenceforth be entitled to the claim and to enforce it for his own benefit; and if the insurer pays the claim of the insured the insured receives compensation from other sources, the insurer is entitled to recover from the insured any sum which he may have received in excess of his actual loss.

And this is what is meant by subrogation.

North Britt. Co., v. L.L.& Globe, 5 Chanc. Div. 569.
Chi.& Alton Ry.Co., v. Glenning, 175 Ill., 238.
Peter v. C. & W. Ry. Co., 121 Mich. 324; 46 L.R.A.224.

THE SURETY'S RIGHT TO SUBROGATION when he pays the debt of his principal, he is entitled to have, enjoy and enforce for his own benefit and to the extent of the loss. He has the right, in other words, to have himself subrogated to all of the leins, EQUITIES, RIGHTS, REMEDIES and PRIORITIES held by the creditor against the principal. This right attaches to the relation of surety in every jurisdiction, and begins when the contract is entered into and is consumated when the surety pays the debt of his principal. It extends not only to all the equities of the creditor against the principal but also against all persons claiming under him - all persons who take securities to which the creditor is entitled - provided they take with notice, whether from the principal debtor or from the creditor.

Brew v. Lockit, 32 Bev., 499;
Atwood v. Vincent, 17 Conn., 575;
Green v. Ferry, 1 De Sow's Eq., 164.

NATURE OF REMEDY. Subrogation is an EQUITABLE RIGHT, not a legal right. It can be enforced only in a Court of Equity or in a proceeding in the nature of an equity proceeding where the distinction between the equitable and legal proceeding is abolished. If subrogation be denied to one he should file his bill in equity or take an equivalent proceeding in the nature of an equitable proceeding for the declaration of his rights and a decree that he be subrogated.

Being an equitable remedy it is subject to the LIMITATIONS OF EQUITABLE REMEDIES in general and therefore it will not be enforced where: (1) it will work injustice to the rights of those having equal rights; (2) where for other reasons it will be in equitable to grant the remedy; (3) where the right is not founded on contract but it may be extinguished or modified by contract.

Hughes v. Hartford Fire Insurance Co., 17 Ill App. 518.

(4) It will be enforced in favor of the claimant notwithstanding he assumes obligations in ignorance of the right.

Dempsey v. Bush, 10 O. Ct., 376.
Hall v. King, 48 O. St. 75.

(5) The substitute will be put in the place, or stand precisely in the shoes, of the one to whose rights he becomes subrogated, but (6) the rights of the substitute CANNOT BE GREATER THAN THE RIGHTS OF THE PERSON TO WHOM HE SUCCEEDS by subrogation. (7) The right is not allowed to one whose claim has been defeated at law.

Frink v. Malfry, 9 Watts (Pa) 384.
Bank of Pensy v. Potius, 10 Watts (Pa) 148.

(8) It is not allowed in favor of the one who is ultimately or really laible for the debt discharged. (9) Nor in favor of one who would thereby derive an advantage, or establish his claim, thru his own wrong or negligence or otherwise inequitable or illegal conduct.

Mill &c. Ry. Co., v. Suter, 13 Wall 517.
American Bank v. U. S., 148 U. S., 573.
Rowley v. Townsley, 53 Mich. 329.
Kelly v. Kelly, 54 Mich. 47.

These are some of the limitations imposed by equitable considerations upon the granting of the writ of subrogation. I will now call your attention to some of the instances in which the right of subrogation has been granted to securities. Remember it was to securities, equities, liens, rights, priorities, etc.,

(1) SECURITIES. See

Goddard v. White, 2 Clifford (English) 449.

In March and April 1857, one McD mad two promissory notes for $3,000 each, each payable to the order of one W. Before maturity the notes were indorsed by A & Co., a co-partnership composed of S.A., G.W., McD, and two others to the Hornellsville Bank and by it to one Ide one ~~X~~ of the defendants. The notes were duly presented for payment by Ide and were dishonored and steps were duly taken to fix the liability of the indorsers, among whom was A. McD then gave Ide a mortgage to secure the notes. Ide being desirous to collect the notes indorsed them over to a man in Paris, who in turn indorsed them over to the defendant White in London. White commenced an action against Hallett, who was then in London. This was in April 1857. In october following White procured Hallet to be arested on a Capias, alleging that he was about to quit England. C and F complainants in this proceeding, became Hallets sureties on his appearance bond, on which Hallet defaulted. Judgement was subsequently rendered against the sureties for the full amount of the notes, including costs and interest. The sureties paid the amount of the judgment into the court and filed their bill praying for a declaration of their rights; namely: that they might be subrogated to the security held by Ide, and that their costs might be taxed and paid out of the fund in the hands of the Court. The court so decreed.

Now there was a debt on which Hallet was liable as indorser. A mortgage had been given by another party who should have paid the debt; a mortgage was given to secure it. There the party had two rights of action: he could have resorted to security or he could have resorted to the personal obligation of the parties bound. He chose the latter; he sued Hallet in London. Subsequently Hallet was arrested on the Capias. C and F signed an appearance bond and guaranteed that he should appear. Halet defaulted. C and F were then entitled to be subrogated to the securities which had been taken for the debt.

The right of SUBROGATION EXISTS INDEPENDENT OF ANY AGREEMENT and is not affected by the fact that the surety knew nothing about the security collateral when he entered into the contract. The right attaches to SECURITIES GIVEN AFTER the surety contracted as well as those given at the time the surety became bound.

(2) SUBROGATION TO LIENS. See

Uzell v. Mack 4 Humph 319,

(3) SUBROGATION TO EQUITIES. In

Pierce v. Hauser 65 Mich. 263,

the parties who were asking to be subrogated to equities were sureties on a bond of an administratrix. The decree of the probate court had determined that after all allowancees were made

there was a fund for distribution in the hands of the administratrix to the extent of the sum of $700.00. An order was made that that sum be distributed, which would pay something like 36 ¢ on the dollar. It appeared later on that the administratrix had used $1200.00 of the funds of the estate in the puchase of a lot which she made a homestead. A suit was brought at law and the suit was defeated on the ground that it was a homestead and could not be taken for her debts. So the bill was filed asking that the sureties who had paid the claim of one of the creditors be subrogated to the equities of the creditors - those equities which permitted the creditors to follow the funds of the estate which had gone into the hands of another party. Now whenever funds are impressed with a trust those funds can be followed wherever they can be traced. There was a certain fund to be distributed and one of the creditors insisted that payment should be made in obedience to the order of the Probate Court, and inasmuch as the administratrix did not make the payment, suit was brot on the bond and recovery was had.

The Court said this: There was a fund of say $1200.00 impressed with a trust. That fund should have been devoted to the payment of the debts of the estate. It was not; it was diverted by the administratrix and put into this property. These creditors have the right to follow that trust fund into this property if they can show that the trust fund went into that property. They had that right; they saw fit not to exercise it; they saw fit to take the easier method of collecting of the sureties on the bond of the administratrix. When they had done so however, by the doctrine of subrogation the sureties who had paid that debt were entitled to step into the shoes of the creditors and enforce that equity which the creditors might have inforced to pay their claim.

LECTURE XV.

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CONTRIBUTION. Among the rights to which the surety is entitled and which he may enforce by proper action against his co-sureties is contribution, by which is meant payment by each of the sureties of his pro rata share of the obligation to the co-surety who has himself paid the obligation - in whole - or satisfied it by paying it in part. The creditor may call upon the several sureties to pay the assured obligation or he may collect it wholly from one of the sureties instead of from all, justice and reason demand that the other sureties shall, (each to the extent of his proportionate share), reimburse the surety who has been compelled to pay the whole obligation. The principle already stated in this form may be stated in another forms: where two or more persons are jointly, or jointly and severally, bound to pay a sum of money and one or more of them are compelled to pay the whole or more than his or their share, those paying may recover of those not paying the aliquot proportion which they ought to pay.

THE RIGHT TO CONTRIBUTION IS A RIGHT INHERENT in the very relation of co-sureties. It is founded in Justice and Equity. It does not depend upon contract between the two parties. It follows from the common obligation resting upon them. It arises from the fact that the one paying has removed the common burdern; hence the others having received an equal benefit, are bound in good conscience to refund him a ratable proportion.

The right to contribution from co-sureties HAS LONG BEEN RECOGNIZED, tho in very early times it was denied. In 1630 the Court of Common Pleas in England denied the right of a surety to have contribution from his co-surety on the ground that to allow it would be a great cause of suits; but in 1639 the right was recognized and contribution decreed in the COURT OF CHANCERY and the co-surety was decreed to pay his proportionate share. The right has not since been denied.

THE REMEDY IS OF EQUITABLE ORIGIN and rests on equitable principles, but after it became firmly established in the equity Courts the law Courts took jurisdiction on the ground of an implied contract arising from the equitable obligation. But the jurisdiction of equity over the subject has not been lost. Frequently Equity is still the preferable form in that it can so frame its decree as to do more ample justice between all the parties than can be done in an action at law.

The first judicial intimation that the surety might sue at common law for contribution was made in the case of

Turner v. Davies, (1796) 2 Esp. 479.

Courts of law began about 1800 to take jurisdiction of the subject-matter of enforcing contribution. In 1801 that was attempted in NORTH CAROLINA and the jurisdiction of the law Court was denied, altho England was enforcing the remedy in a Court of Law as early as that.

WHO HAS THE RIGHT TO CONTRIBUTION ? He who has paid more than his share of the obligation and has NOT PAID IT VOLUNTARILY. But until he has paid he has no right to demand contribution. The cause of action then first accrues when he has paid or when it is entirely cleat that he MUST pay. This rule may put to a disadvantage the honest and responsible surety and enable the dishonest surety to avoid his own obligation, whether of payment or of contribution. Consideration of such facts lead to the enlargement of the remedy, or a further remedy. And so the rule may be stated thus; o ne surety may, without having actually paid the debt, bring a bill in equity to compel his co-surety to co ntribute with him to its payment.

Hodson v. Baldwin, 65 Ill., 532;
Wohenhausen v. Gullick, L.R. (1893) 2 Chan. 514.

This method however is rather in the nature of EXONERATION than in the line or nature of contribution. In taking such a remedy, that on one bound to pay files his bill for the purpose of compelling another equally bound to pay to share his burden with him. So it has been held that the surety, without having actually paid the debt, may prevent his co-surety from SELLING OF FRAUDULENTLY CONVEYING AWAY his property with intent to avoid his obligation.

Smith v. Rumsy, 33 Mich. 183,
Pashby v. Madego, 42 Mich. 172.

But for the PURPOSES OF AN ACTION TO RECOVER the defendants proportion of the debt, whether at law or in equity, the right is regarded as maturing when the plaintiff has paid more than his share of the debt, and : untill that time there is neither equitable obligation nor implied contract to make such contribution.

Now with the exceptions I have spoken of already the surety cannot call upon his co-sureties fro any relief in the shape of contribution until he has paid the debt.

FROM WHOM MAY CONTRIBUTION BE COLLECTED ? From co-sureties and co-sureties only.

WHO ARE CO-SURETIES ? The determination of that question has been prolific of much litigation. In some respects the answer under some circumstances is easy; under others it is difficult.

(1) ALL SURETIES ARE CO-SURETIES WHO JOIN in the same instrument. That is easy of solution.

(2) THOSE WHO ARE SURETIES OF THE SAME PRINCIPAL and with reference to the same trans action are likewise co-sureties; tho they are bound by different instruments and at different times and for different amounts. A LEADING CASE ON THIS SUBJECT IS

Deering v. Earl of Winchelsea, 1Cox 318; 2 B & P 270;
White & Tud. Lead Cas in Eq, Vol 1, part 1, 120.

In this case one D, who had to give a collector's bond for 12000 pounds, gave three bonds, each by a different party for 4,000 pounds. D defaulted in the sum of 3,900 pounds and the judgment was had against surety E on his bond. E then filed his bill against the sureties in the other two bonds, claiming from them contribution toward the sum so recovered against him. His demand was resisted on two grounds:

that there was no foundation for the demand in the nature of the contract; (2) That the conduct of E had been such as, under the maxim about 'coming into equity with clean hands', to disable him from claiming in a court of equity the benefit of a court of equity, tho it did otherwise exist. It seems that E was a man of means and the principal was not; E was also a high liver and had encouraged D in fast living and conduct which tended to make it probable if not certain that default would ultimately come.

The court held that the maxim about 'clean hands' does not relate to general depravity or moral obliquity, but it must have an IMMEDIATE RELATION TO THE EQUITY SUED FOR.

With reference to the first ground, the court established principles which since that time have been strictly adhered to; such as

That the right to . CONTRIBUTION IS FOUNDED IN DOCTRINES OF EQUITY AND DOES NOT DEPEND UPON CONTRACT. (2) That sureties, if bound by DIFFERENT INSTRUMENTS FOR THE SAME PRINCIPAL AND the same engagement, are co-sureties and bound to contribute to that one of their number who has been compelled to pay more than his share.

THE COURT SAID, 'In all these cases the sureties have a common interest and common burden. They are joined by the common end and purpose of their several obligations as much as if they were joined in one instrument; with this difference only; that the penalties will ascertain the proportion in which they are bound to contribute, whereas if they had joined in one bond it would have depended on other circumstances.' The obligation of each was limited to 4,000 pounds, but in no other respect was it different from what it would have been if they had joined in one bond. Neither could have been compelled to contribute morethan 4,000 pounds. The court decreed that each of the sureties should be compelled to pay 1/3 of the amount recovered against E.

Every student of the law of suretyship should make himself familiar with this case and with the annotations contained in White and Tudor.

The rule that co-sureties are bound to contribute IS SUBJECT TO CERTAIN LIMITATIONS, a few of which will be referred to:

(1) Contributions cannot be recovered WHEN IT WOULD BE INEQUITABLE. If the party bases his right to recover on principles of natural equity the defendant may appeal to the same principles in his defense.

Dennis v. Gillespie, 24 Miss. 581.

For example, A, B and C were sureties for D in abond. Judgment was recovered against A, B and D but not against C. Execution was sued out and levied on the property of D, the original debtor and principal. D gave a forthcoming bond, in which A, B and a third party joined as sureties. Execution issued on the forthcoming bond and was levied on the property of A. It was held that A could not recover contribution from C, because the money would have been made out of the property of D but for the forthcoming bond and it was inequitable that C should suffer by

the giving of such a bond.

Langford's Exrs. v. Perrin, 5 Lea (Va.) 552.

(2) Contribution cannot be recovered from a surety WHO BECOMES LIABLE AT THE REQUEST OF ANOTHER SURETY, at the suit of the surety so requesting. It has been held that if the surety becomes bound by the request of the principal, to which is added the request of another surety, he is liable to contribution to the surety who joined with the principal in making the request.

Hendricks v. Whittemore ('03 Laws), 105 Mass. 23.

(3) Contribution cannot be recovered from ONE WHO SIGNS AS SURETY FOR A SURETY and not as surety for the principal.

(4) Surety is not charged with contribution to another surety WHO PAID THE DEBT VOLUNTARILY.

Smith v. State, 49 Conn. 90.

But if the plaintiff is legally liable it is not necessary for him to await the levying of execution to recover judgment, or even to await the bringing of suit.

Hardell v. Carrno, 90 Wis. 350.

AMOUNT TO WHICH EACH CO-SURETY SHOULD CONTRIBUTE. The rule is equality of burden. Each should contribute his share of the whole burden. Take the case of one of three sureties who has paid the whole claim of say $3,000. The proportion of each is $1,000. Suppose that ONE IS INSOLVENT: the other must pay a moiety, and $1500 will be the amount. In fixing the amount of contribution in favor of a surety against his fellows, a SURETY WITHOUT THE JURISDICTION (that means without the STATE), like an insolvent, is excluded, so that the entire burden is divided among those within the jurisdiction; perhaps I should say those who are residents.

Security Co. v. St.Paul Co., 50 Conn. 233.

Liddell v. Wiswell, 59 Vt. 365.

Farnum v. Gates, 86 Wis. 569.

Non-resident co-sureties cannot, and insolvent co-sureties need not, BE MADE DEFENDANTS to a bill in equity for contribution.

Johnson v. Vaughn, 65 Ill. 425.

THE COMMON LAW RULE as to the share of contribution is that each surety is liable for a proportionable part of the loss according to the original number of sureties, whether all are solvent or not.

Litard v. Hawed, 2 Ellis & Black (1853) 287; 75 E C L 287

IN EQUITY, if any of those who should contribute are insolvent they are to be excluded in determining the proportion.

Cowell v. Edwards, 2 B & P. 268.

But in some cases this distinction is denied and contribution is given at law according to the number of solvent sureties, while in all states where the distinction between law and equity has been abolished, the number of solvent debtors liable to contribute is the basis of apportionment. The rule is then that the sureties who are bound to pay are bound to pay in equal proportion. These rules have their place in a court of law as well as in a court of chancery, and would operate equally well in a court of law (except perhaps the one which was raised in Deering v. Earl of Winchelsea, where an equitable maxim was invoked) as in a court of equity.

FINIS

L E C T U R E X V I .

Of the Surety's Defences.

I shall direct attention briefly to the principal defenss available to the surety.

I. Defences arising out of a material alteration of the contract.

A material alteration of the assuring contract or of the principal contract will discharge the surety from his undertaking. A material alteration of a contract is such a change in the terms thereof as imposes some new obligation on the party promising or takes away some obligation already imposed. A change in the form of the contract which does not bring about one or the other of these results is immaterial. I shall direct attention

1.

To cases illustrating the effect of an alteration of the assuring contract.

Davidson v. Cooper et al. 13 M. & W. 343.

This case was decided in 1844. A written guaranty while in the hands of the plaintiff was altered by some person unknown by the addition of two seals placed opposite the names of the parties to it whereby the apparent nature and effect of the instrument were wholly altered. This is the extreme rule where the alteration is held to operate as a discharge even though made by a stranger. This rule would not be followed now. Any change or mutilation resulting from accident or the act of a stranger will not effect the liability of the promisor.

Anderson v. Bellenger, 87 Ala. 384; 6 So. R. 92.
State v. McGonigal, 101 Mo. 353; 13 S. W. 758.
Murray v. Graham, 29 Iowa 520.
Brooks v. Allen, 62 Ind. 401.
Ellsmere Brewing Co. v. Cooper, L. R. 1 Q. B. 75, (1896).

Cooper had signed a bond as principal with four other defendants as sureties by the terms of which the obligors were jointly and severally bound to the plaintiff in the sum of one hundred and fifty pounds, conditioned that Cooper, who had been appointed agent for the plaintiff company, would duly account for all moneys received by him for plaintiff and otherwise perform the duties of his agency. The bond provided that the liability of Nunnerly and Emberton (two of the defendants) should be limited to fifty pounds each,

and that of Pray and Broomfield (two other of the defendants) to twenty-five pounds each. The effect therefore of the bond as drawn was that the principal and the sureties were jointly and severally bound in the sum of one hundred and fifty pounds but that liability could not be enforced against any of the sureties beyond the limits of the sum specified as to each of them. Nunnerly was the last to sign and his signature appeared on the bond thus, "William Nunnerly, Twenty-five pounds only". This signing was in the presence of the plaintiff's agent and its effect was held to be the same as if the recital in the bond reciting Nunnerly's liability to fifty pounds had been altered by writing twenty-five pounds in place of fifty pounds. The court held the several sureties discharged of their liability.

(This case should be read as part of the course.)

The more frequent illustration of the rule results from an alteration of the principal contract. Any change in the terms of the principal contract or obligation which obliges the debtor or obligor to do something which he was not before bound to do will discharge the surety or guarantor from his undertaking

Doalt v. Brown, 10 Ohio St. 384.
Patterson v. McNealy, 16 Ohio St. 348.
Waterman v. Vose, 43 Me. 504.
McGrath v. Clark, 56 N.Y. 34.
Hart v. Clauser, 30 Ind. 210.
Hessel v. Johnson, 63 Mich. 623; 30 N. W. 209.

The discharge of the surety under the circumstances mentioned results from either of two reasons:

1. It is an increase of the promisor's risk or hazard. The imposing of new burdens on the principal may be the cause of his failure to perform any part of his contract. The new conditions or terms might indirectly at least render impossible the carrying out of the things which were the subject of the guaranty.

2. The contract as changed is not the same contract guaranteed by the promisor. The original contract has been put an end to and a new one substituted. The guarantor has never agreed to stand good for the latter, and suretyship cannot be imposed without the expressed contract of the promisor, and his execution of the original contract will not carry by implication any liability upon a substituted contract although the substituted contract is similar to the original.

The substantial basis for the discharge is that of the substituted contract, and if it be on that ground it is of no moment if the alteration results in the benefit of the promisor rather than injury. The Supreme Court of the United States places the ground of discharge upon the basis of the substituted contract.

In Wood v. Steele, 6 Wall. 80, the court says:

"The grounds of discharge in such cases are obvious. The agreement is no longer the one into which the defendant entered. The identity is changed; another is substituted without his consent by a party who had no authority to consent for him. There is no longer the necessary concurrence of minds. If the instrument be under seal, he may yet plead that it is not his deed; and if it be not under seal, that he did not so promise. In either case the issue must necessarily be found for him. To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally made. In pursuance of a stern but wise policy it annuls the instrument as to the party sought to be wronged."

But the proposition that the surety should be discharged even though the alterations of the contract are beneficial to the surety has been challenged on the ground that it is a mere technicality without any equity in its favor and not within the adjudicated rules in suretyship.

Cambridge Savings Bank v. Hyde, 131 Mass. 77.

The change in this case was the reduction of the interest from 7 1/2 % to 6 1/2 %. Morton, J., lays down the rule in such a case as follows:

"But if the change in the original contract from its nature is beneficial to the surety or it is selfevident that it cannot prejudice him, the surety is not discharged."

This rule, it seems, appeals to reason and is in line with a modification of the apparently illegal rule that a party even though not prejudiced by an alteration is relieved by it. In this connection it may be stated that the Negotiable Instruments Law permits a recovery on the instrument as it was in the origianl form, if the original form can be determined. But it must be said that this view, by the great weight of authority, is rejected upon the ground of the substituted contract. The position of the courts seems to be that the integrity of written instruments should be preserved; that he for whose benefit such instruments are intended and is charged with their preservation must at his peril see to it that they are not altered. No rule of law is better settled than that the undertaking of the surety is strictissimi juris.

And so it is held by what appears by the great weight of authority that the surety can not either at law or equity be bound farther or otherwise than he is by the very terms of his contract. So in the case of the alteration of the principal contract he is not bound by the contract for that has been abrogated, nor is he bound by the new contract because he is no party to it; nor is it of any consequence that the alteration in the contract is trivial. It is open to the surety to say,"I have not thus treated with you". It matters not by what motives the alteration was made; it is enough that it was made and is material.
Bethune v. Dozier, 10 Ga. 235.

The question has been mooted, However, whether an alteration will be effective to discharge the surety in the absence of a fraudulent intent, but by the weight of authority it seems to be settled that the absence of a fraudulent intent is not sufficient to modify the rule that the surety will be discharged by the alteration. It is enough that the alteration was in fact made and that it is material. An instance of a trivial alteration in the principal contract is furnished by the case of
Whicher v. Hall, 5 B. & C. 269, (1826).

Whicher and Joseph Hall had entered into an agreement whereby the latter was to have the milking of thirty cows through out the year at a stipulated price per cow, which price the defendant James Hall undertook to pay. The contract was so changed without the knowledge or consent of the ~~plaintiff~~ defendant James Hall that Joseph Hall was to have the milking of twenty-eight cows during a part of the year and thirty-two during the other part of the year. The court held that the surety was discharged by this change in the terms of the contract, adding that there might be a very little difference between the two contracts but the question did not turn on the amount of the difference. The real question was, whether the contract performed by the plaintiff was the original contract to which the defendant was a party.

Material alterations resulting in the discharge of the surety arise in such cases, among numerous others, as follows:-

1. Where the alteration consists in a change in the place of payment.

2. Where the alteration consists in a change in the date of maturity, whether it hasten or delay the time of payment.

3. Where the alteration is made by the debtor or creditor, it matters not whether by the one or the other.

4. Where a new party is added as principal maker. The reason of this rule lies in the fact that the addition of a new name might change a several contract to a joint and several. The decided weight of authority is that the addition of a new party to the principal contract constitutes such a material alteration as will discharge the surety or guarantor

Wallace v. Jewell, 21 Ohio St. 163.
Chadwick v. Eastman, 53 Me. 12.
Shipp's Adm'r v. Suggett's Adm'r, 9 B. Mon. 8.
Hamilton v. Hooper, 46 Iowa 516.

But the addition of a new party to the assuring contract as surety or guarantor is not a change of the principal contract. The undertaking of the new surety is merely collateral to the main contract and not incorporated into it and the principal remains in exactly the same position to the creditor as before. No question either of increase of risk or substituted contract is involved in such a case.

Mersman v. Werges, 112 U.S. 130.
McCaughey v. Smith, 27 N.Y. 39.
Montgomery R. R. Co. v. Hurst, 9 Ala. 513.
Miller v. Finley, 26 Mich. 249.
Stone v. White, 8 Gray 589.
Contra, Berryman v. Manker, 56 Iowa, 150; 9 N.W. 103.
Limestone v. Penick, 2 T. B. Mon. 98.

5. Where the alteration amounts to a change in the contract of employment or the performance of a duty for which the surety is sponsor. If the parties to the main contract by agreement substitute other duties for the principal although the general character of the employment is not changed, the sureties cannot be held for a breach of these added duties.

a. Bond to insure the fidelity of bookkeeper in bank promoted to position of receiving teller.

National Mechanics' Banking Ass'n v. Conklin, 90 N.Y. 116.
Kellog v. Scott, 58 N.J. 344; 44 Atl. 190.

b. Guaranty of sale of merchandise upon credit of six months will not be held good for a sale made on a credit of less or more than six months.

Leeds v. Dunn, 10 N.Y. 469.
Henderson v. Marvin, 31 Barb. 297.
Stewart v. Ranney, 26 How. Pr. R. 279.

c. A change in the character of the merchandise guaranteed will discharge the guarantor.

Grant v. Smith, 46 N.Y. 93.

d. Where new duties are given public officers by subsequent legislation the sureties on the bond of the officer have been held in some cases to be discharged.

Miller v. Stewart, 9 Wheat. 680.
Denio v. State, 60 Miss. 949.
Bessenger v. Wren, 100 Pa. 500.

Where a right to add new duties or change those already provided for is reversed in the contract, a change in accordance with such provision will not discharge the surety. Such, for example, is the usual building contract in which the right

to change the plans and specifications is usually reserved.
Miller v. Eccles, 155 Pa. St. 36; 25 Atl. 776.

6. Where the amount of advancements under a limited guaranty is varied, in such a case the guarantor will be discharged. Whether the amount be reduced or enlarged is immaterial. For example, the amount due on a promisory note was changed by the endorsement of a credit due in another transaction. This was held to be a material alteration whereby the surety was discharged.
Johnson v. May, 76 Ind. 293.
But when the transaction is merely a proposal to guarantee optional advances up to a certain amount the guarantor will be liable for such advances as are made in reliance upon his guaranty whether the amount be equal to or less than the sum named in the latter of credit, and his liability within the limit named will be unaffected by the fact that the creditor may have advanced a greater sum.
Claggett v. Salmon, 5 G. & J. (Md) 314.
When the guaranty is upon condition that the creditor make advancements not exceeding a certain amount, credit in excess of this amount will constitute a material alteration and will discharge the guarantor.
Bloomington Min. Co. v. Searles, 63 N.J.L. 47; 42 Atl. 840.
Kimball v. Baker, 62 Wis. 526; 22 N.W. 730.

7. Where the principal contract is so changed that new parties are substituted for those originally contracting or a new party is added, the surety or guarantor will be discharged.
White Sewing Machine Co. v. Hines, et al., 61 Mich. 423.

8. Where the alteration consists of a change in the time when the principal contract was to be performed. This presents the usual and familiar case of extension of time to the principal. Extension of time in favor of the principal debtor is an alteration of the principal obligation. If the time of payment be extended without the consent of the surety, he is discharged from his undertaking. Extension of time to the principal is more than a mere alteration; it is in many cases an increase in the risk, and in all cases a deprivation of the surety's right to pay the debt and be entitled to immediate subrogation. The agreement to extend discharges the surety and the discharge is from the time of the agreement. This, however, is subject to the requirement that the agreement for extension must be based upon consideration. There must be a substitution of a new contract so that the parties are no longer bound by the original contract as to performance.
Extension of time by legislative enactment is held by some courts to operate as a discharge of the surety, while the contrary is held by other courts.
State etc. v. Swiney, 60 Miss. 39; Cases, 238.
I have made mention of a limited number of the principal cases which give rise to a defense of the surety based upon a material alteration of the contract. No doubt those I have omitted to mention are quite as numerous and quite as important as those I have mentioned. The general rule, however, may be

gathered from what has been mentioned, and illustrations will appear from the cases cited. The alteration, bear in mind, must be material. It need not necessarily be, according to the weight of authority, to the disadvantage of the surety; if the alteration results in a substituted contract the surety is, by the weight of authority, discharged.

LECTURE XVII.
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Of the surety's defences. (Continued)

II. Defence rising from an absence of liability of the principal debtor to the creditor.

It is a general rule that "the obligation of the surety being accessory to the obligation of some person who is the principal debtor, it is of its essence that there should be a valid obligation of a principal debtor. The nullity of the principal obliga ion necessarily induces the nullity of the accessory".

Theobold Prin. & Sur. 2.

The rule is illustrated by the case of Russel v. Annable, 190 Mass. 72; Cases, 193, where the principal obligors were a partnership and the defendant one of the sureties. The principal obligation had been executed in the partnership name but not in such a way as to be binding on the partnership. The defendant's undertaking being only that the principal obligors should fulfil their obligation and there being no obligation upon the partnership by reason of the defect in execution, the defendant surety was discharged.

Another illustration of the general rule is furnished by the case of Swift, et al. v. Beers, 3 Denio 70, a case in which a banking association, contrary to the statute of N.Y., issued a promissory note, the payment of which was guaranted by the defendant. The defence was based upon the fact that the note was illegal and void and being so the guaranty was likewise illegal and void. The defence was upheld on the ground that the guaranty partook of the character of the principal contract and was designed to reinforce and secure it. The principal contract being void, the guarantor was discharged.

But the general rule as stated and illustrated has its exceptions. For example, a surety on the contract of a married woman is not discharged from his undertaking because the married woman is not liable on the principal contract.

Kimball v. Newell, 7 Hill 116; Cases, 187.

As a general proposition sureties are not discharged of their undertakings to answer for the voidable contracts of infants but there are exceptions to this rule, particularly where the undertaking of the sureties goes to the whole consideration.

Baker v. Kennett, 54 Mo. 82.

Sureties on the contract of a person of unsound mind are held liable under like circumstances as sureties on the contract of a married woman or of an infant.

Lee v. Yandell, 69 Texas 34; Cases 192.

In this case which concerned the liability of a surety for a person of unsound mind, the court declares: "The contract

of a surety is, that if the principal does not pay he will, and sound policy as well as the plainest principles of justice demand that where there is a valid consideration, and the payee has done nothing to deceive or mislead either principal or surety and the principal is held not to be liable on account of some disability existing at the time of the making of the contract whether such disability be coverture, infancy or unsoundness of mind, the surety should be held to the terms of his contract".

A surety cannot maintain a defense based upon the fact that the principal obligor executed the principal contract through duress. Duress at the common law is a personal defense pleadable by him only who is the subject thereof. Therefore duress of the principal is not available as a defense to the surety, at least unless the surety at the time of executing the obligation is ignorant if the circumstances which render it voidable by the principal.

Hazard v. Griswold, 21 Fed. 173; Cases, 199.

III Defense arising out of the extinguishment or suspension of the liability of the principal debtor to the creditor.

As a general proposition the surety cannot be held for a greater sum than his principal. Wherever the inquiry is one of original liability the surety cannot be held to a greater extent than the principal is bound for. The principal's obligation defines the boundary upward beyond which the surety's obligation cannot be carried. And so it is that the creditor can do no act by which he reduces the principal's liability without at the same time reducing the surety's liability, at least to the same extent. But the rule is very different where the law reduces or absolves the principal's liability without the fault or procurement of the creditor. In such case the principal's defense is personal and does not affect or impair the surety's liability unles he also have a personal defense. Discharge of the principal in bankruptcy, or by failure to present or file the claim against the estate of the deceased principal is discharge by operation of law, and such extinguishment of the principal's liability is not available to the surety as a defense.

Paul v. Christie, 4 Harris and McHenry, (Md.) 161.

(Extinguishmen of interest by state of war from July 4th, 1776, to September 3rd, 1783.)

Cuild v. Butler, 122 Mass. 498; Cases, 208.

(Extinguishment of principal debt by composition in bankruptcy.)

Villars v. Palmer, 67 Ill. 204; Cases 205.

(Failure to present claims against the estate of deceased principal.)

In this case it is held to be a well established principal that mere delay on the part of the creditor, not amounting to an affirmative act, to proceed against the principal, does not discharge the surety. All the surety has the right to require of the creditor, in the absence of statutory provision, is, that no affirmative act shall be done that will operate to his pre-

judice. It is his business to see that the creditor pays.

If mere delay to proceed against the principal does not discharge the [illegible] surety, it must follow that when the statute of limitations has extinguished the claim of the creditor as against the principal debtor, the surety is not thereby discharged of his undertaking and such is the general rule.

Moore v. Gray, 26 Ohio St. 525.
Hooks v. Branch Bank, 8 Ala. 580.
Bank v. State, 62 Md. 88.
Willis v. Chowning, 90 Tex. 617; 40 S.W. 395.

The reason is not far to seek. It lies in the fact that the surety has his protection in his own hands. He may pay the debt and bring his own action against the principal, or he may proceed in equity to compel the principal to pay, or he may require the creditor to sue the principal. He will not in any event be permitted to exact from the creditor a greater degree of diligence than he himself is willing to exercise in his own interest.

But the general rule as I have stated it does not meet with unanimous approval.

Auchampaugh v. Schmidt, 70 Iowa, 642; Cases 206.

The point I would have you bear in mind as a controlling feature is determining whether the surety is discharged by the extinguishment of the liability of the principal debtor is this: If the extinguishment of the principal's liability resulted from the affirmative act of the creditor the surety is discharged; if from operation of law the surety is not discharged.

A well considered case on this distinction is
Cragoe v. Jones, L.R. 8 Exch. 81, (1873).
(State the case).

IV. Defenses arising out of the principal debtor's right of set-off or counterclaim against the creditor. Set-off and counterclaim rest on statutory authority. To save multiplicity of actions it has been wisely provided that cross demands existing between parties, if both demands are complete and capable of liquidation, can be determined in a single suit. Statutes creating these rules in the interest of doing justice and in prevention of multilplicity of actions generally do not in terms include persons standing in the suretyship relation where the cross demand is between the principal and creditor, but the statute in some instances gives the surety sued alone the benefit in set-off in the right of the principal.

Sefton v. Hargett, 113 Ind. 592; 15 N.E. 513.

If the principal has a set-off or a counterclaim against the claim of the creditor, the same set-off or counterclaim is available as a defense to the surety, provided the principal and surety are co-defendants, or provided the statute, as in Indiana, gives the surety when sued alone the benefit of set-off in the right of the principal. Where all the parties are before the court the right of equitable set-off or counterclaim in favor of the promisor upon cross demands between principal and creditor is fully recognized and established in this country. This rule is laid down in the leading case of

Mahurin v. Pearson and Bellows, 8 N.H. 539; Ames' Cases, 190.

The case was assumpsit on a note by Pearson and signed by Bellows as surety. The action was against both Pearson and Bellows, principal and surety. The defendants pleaded the general issue with notice of set-off of demands in favor of Pearson, the principal. The trial court rejected the set-off on the ground of want of mutuality of the parties, the set-off being in favor of one of the defendants only. On appeal the Supreme Court held that the defense was available in favor of the surety as well as of the principal. This case has been generally followed.

Where the action is against the principal and surety as joint defendants no difficulty arises, and this for the reason that the creditor should not be permitted to invoke a multiplicity of actions in adjusting his accounts with the principal, if by means of set-off or counterclaim and without injustice to any of the parties involved, the same result could be reached in one action. If the creditor be insolvent an additional and stronger equity exists in favor of preventing him from enforcing his demand against the surety except upon condition of first deducting his debt to the principal.

To permit a set-off or counterclaim in favor of the promisor in suretyship in the right of the principal involves a practical difficulty, if the principal's claim against the creditor exceeds that of the promisor's liability. The promisor in suretyship cannot have a judgment for the balance in his favor; neither could the right of action for the balance be preserved to the principal without making divisible that which in its nature is entire, and exposing the creditor to a multiplicity of actions if the claim of the principal against him should be divided.

In this case, therefore, in which the creditor does not elect to make the principal and promisor in suretyship co-defendants in his suit, and in cases where the procedure does not permit the promisor in suretyship when sued alone to bring in the principal as a party, the doctrine of equitable set-off or equitable counterclaim in favor of the surety and in the right of the principal cannot apply, at least, not in those cases where the principal's claim against the creditor exceeds that of the creditor against the surety.

Gillespie v. Torrance, 25 N.Y. 306; Cases 211.

V. Defense arising from the surrender or loss of securities by the creditor.

1. As to release of securities by the voluntary act of the creditor. If the creditor has security for the debt in the way of a mortgage or other lien in addition to the personal contract of the surety, he is charged with the duty of maintaining such security. Any surrender or loss, release or impairment, of such security as an ultimate source for the payment of the debt will discharge the assurer to the extent of the security released or lost.

Pearl v. Deacon, 24 Beav. 186; Cases 216.

This rule results from the inherent equities of the suretyship relation. If the assurer were required to respond to his personal obligation, he would be entitled by subrogation to the securities held by the creditor. If they were lost to him through surrender or release by the creditor, he would be deprived of a substantial right to which his relation equitably entitles him. Hence, it is obvious that he can base a defense partial or entire according to the circumstances, on the fact that the creditor has surrendered, released, or lost the securities held by him for the debt.

The creditor is under no obligation to the assurer to acquire any lien upon property of the principal unless so required by the condition of his contract, such for example, as a guaranty of collection. Nor is the creditor obliged to get into his possession any of the property of the principal unless the contract so requires in terms or by implication-- such a contract as, for example a guaranty of collection. But if the creditor does in any way secure a lien by attachment, execution, or otherwise, or receives into his possession some of the property of the debtor as additional security, a trust relation immediately arises between the parties and the trustee-- the creditor-- is bound to account to the assurer for the value of the security in his hands. It matters not whether the lien on, or custody of, the property is acquired at the time the surety contract is entered into or afterwards.

Holland v. Johnson, 51 Ind. 346.

Nor does it matter whether the assurer have any knowledge of the additional security at the time he signs or at the time the security is given. He becomes a beneficiary of the trust relation without notice of its existence and can claim its benefits whenever brought to his knowledge.

The assurer's defense is complete and not partial if the suretyship contract is made upon condition that the principal shall furnish the creditor additional security and the security is furnished in compliance with the contract, and is afterwards released by the creditor, and this too, without regard to the value of the securities released, because such a transaction amounts to an alteration of the main contract.

Polak v. Everett, 1 Q.B. Div. 669.

The assurer's defense is complete in such cases even though the securities released have no value. But where the rights of the assurer are dependent merely upon his equity of subrogation as distinguished from an alteration of the contract, the assurer can have no relief if the securities released are without value.

Rainbow v. Juggins, 5 Q.B. Div. 422.

Elyndenburg v. Bingham, 38 N.Y. 371.

Green v. Blunt, 59 Iowa, 79, 12 N.W.R. 762.

Lilly v. Roberts, 58 Ga. 363.

Does the fact that the creditor has released securities

securities to the value of the debt although he has retained other securities in his hands sufficient in value to pay the debt, make a complete defense for the assurer? The question has been answered both ways. In Holt v. Body, 18 Pa. St. 207, the answer is affirmative. In Saline Co. v. Buie, 65 Mo. 63, the answer is negative. Which of these holdings has the support of reason? The Pennsylvania holding proceeds upon the theory that the party whose act gave rise to the release must bear the burden of all risks arising from his act and the uncertainty of the evidence and the fallibility of the jury, and the surety should not be compelled to bear the burden of such risk, uncertainties and fallibilities. The Pennsylvania court holds that the creditor has violated a vested right of the assurer. The Missouri holding proceeds upon the theory that the surety has not been prejudiced in his rights by the release of a part of the security, there being enough left to indemnify him against loss if he should pay the debt and thereby be substituted to the security remaining.

The release of one of two securities for the same claim has been held not to be available to the surety as a defense. For example, a release of execution upon land upon which the judgment is a lien is held not to discharge the surety since the security is not diminished.

Sasscer v. Young, 6 Gill and Johns. (Md) 243.

Wood v. Brown, 104 Fed. 203.

2. As to release of securities by misconduct of the creditor. The creditor is bound to the duty of exercising that care in the preservation of securities which as a prudent man he would exercise in his own interest. The surety is discharged wholly or partially if the creditor without the use of ordinary care has suffered the securities to be lost or stolen.

Jankins v. National Bank, 58 Me. 275.

Inactivity or lack of diligence on the part of the creditor whereby securities are made unavailable is a breach of duty as effective to discharge the assurer as the voluntary release of securities. For example, a creditor fails to file a mortgage of the principal whereby the other liens have become superior, the assurer is discharged wholly or partially.

Burr v. Boyer, 2 Neb. 265.

Teaf v. Ross, 1 Ohio St. 469.

State Bank v. Bartle, 114 Mo. 276; 21 S.W.R. 816.

Sullivan v. State, 59 Ark. 47, 26 S.W.R. 194.

Capel v. Butler, 2 Sim. & Stu 457.

Wulf v. Jay, 7 L.R.Q. B. 756.

Contra, Philbrooks v. McEwan, 29 Ind. 347.

So too the assurer is discharged wholly or partially if the creditor, having in his hands obligations of third parties due to the principal, fails to take the necessary steps to collect the same until they become worthless.

City Bank v. Young, 43 N.H. 457.

Douglass v. Reynolds, 7 Peter 113, and other cases dited in note 112, Stearns, p. 141.

The extent to which the assurer is discharged in such cases is determined by the vlue of the property at the time the lien could have been made effective by filing, or the amount that could have been realized on the collateral in case the creditor had acted with due diligence.

Mere delay in enforcing liens, although such delay renders ineffective securities that might have been applicable to the debt if prompt action had been taken, will not discharge the surety or guarantor. Thus, failure of a creditor to foreclose a mortgage given him by the principal will not discharge the surety.

Howe Co. v. Farrington, 82 N.Y. 121.
Gusard v. Hinson, 50 Ark. 229, 6 S.W.R. 906.
Sheldon v. Williams, 11 Neb. 272, 9 S.W.R. 86.
Day v. Elmore, 4 Wis. 190.
Fuller v. Thompson, 53 Iowa 111, 12 N.W.R. 127.

The duty of filing the mortgage results from the fact that the instrument is within the sole custody of the creditor. He alone has the opportunity to make a lien effective and to prevent superior liens. Such opportunity is not open to the assurer to protect himself, but after the lien is made effective by filing the assurer may pay the debt and become subrogated to the rights of the creditor in the security, which he may then foreclose himself.

As to the creditors duty in dealing with the securities in his hands the rule may be stated in these brief terms. He is obliged to exercise due care and deal with the securities in his hands in good faith. Failure so to act will amount to misconduct, and if the assurer is injured by such miscinduct he will be discharged to the extent to which he has been injuriously affected. Good faith and due care in dealing with the securities in his hands imply the exercise of good judgment in the disposition of securities, and so it is that if the creditor through lack of good judgment dispose of the securities at a sacrifice, the damage resulting from such misconduct will be chargeable to the creditor.

Hutchinson v. Woodwell, 107 Pa. 509.
Holliday v. Brown, 33 Neb. 657, 50 N.W.R. 1042.
Allen v. Donald, 23 Fed. 573.
New England co. v. Randall, 42 La. Ann. 260, 7 So. R. 679.
McMullen v. Hinkle, 39 Miss. 142.

3. As to release of securities by operation of law. A surety is released from his undertaking in whole or in part if the securities while in the hands of the creditor have been surrendered or lost by operation of law. Thus, where through the act of the sheriff the property of the principal debtor is released from levy of an execution, a surety for the judgment debtor is discharged.

Miller v. Dyer, 1 Duv. (KY.) 263.
Lumsden v. Leonard, 55 Ga. 374.
Flemming v. Odum, 59 Ga. 382.

Where a judgment lien is obtained by the creditor upon land of the principal and the creditor assigns his lien to one who also acquired by transfer from the principal the land upon which the lien rests, this being by operation of law a merging of the lien in the fee, the surety was held to be released.

Wright v. Knepper, 1 Barr. (PA.) 361.

VI. Defense arising from the failure of the creditor to use money within his control in lawful payment of his claim.

The surety is released if the creditor refuses to receive payment when tendered by the principal obligor. He is likewise released if the tender of payment made by him is refused by the creditor.

O'Conner v. Braly, 112 Cal. 31, 44 Pac. R. 305.

Non-acceptance by the creditor of the principal's offer to pay when the offer does not amount to a tender does not, so it has been held, amount to a release of the surrty, even though the debt is due when the offer is made.

Clark v. Sickler, 64 N.Y. 231.

The defense under consideration finds its most common illustration in the case of banks failing to apply the depositor's account to the payment of a matured obligation. In such cases it has been held that if a principal makes a note payable at his bank, whether the payee be a bank or a third person, and the balance in the principal's favor when the note matures is large enough to pay it, an indorser or other security will be discharged if the bank does not honor the note, for the bank is bound to pay such notes just as it is bound to honor its customers' checks.

Home Bank v. Henninger, 105 Pa. St. 496.
German Bank v. Foreman, 138 Pa. St. 474.
Mechanics Bank v. Seitz, 150 Pa. St. 632.
Bank v. Peltry, 176 Pa. St. 513.

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LECTURE XVIII.

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VII. Defense arising from the failure of the creditor to sue the debtor at the surety's request.

We have seen that mere delay on the part of the creditor to proceed against the principal does not release the surety or guarantor, unless diligence is imposed upon the creditor by his contract or by statute. Does a request made by the surety that the creditor sue the principal impose duties upon the creditor of which it is conceded he was not bound but for the request? The Supreme Court of New York in

Pain v. Packard, 13 Johns. 174, Cases, 219, held that the surety was discharged when at his request the creditor failed to sue the principal debtor who afterward became bankrupt and absconded. Pain v. Packard is considered the parent case in the line of authorities maintaining this doctrine. The decided weight of authority is against the doctrine of Pain v. Packard.

In principle and by weight of authority a surety cannot make a defense out of the failure of the creditor to sue the principal debtor when requested to do so by the surety.

The object of the surety in requesting the creditor to sue is to spur on the creditor to diligence. But the surety has his remedy in his own hands. He may pay the debt at maturity and bring his own action against the debtor or by bringing a proceeding in equity against the principal to compel him to pay the creditor.

Moore v. Topliff, 107 Ill. 241.

Ardesco Oil Co. v. North Amer. Oil Co., 66 Pa. St. 375.

The surety should not be permitted by mere request to shift upon the creditor the burden of a greater degree of diligence than he is willing to exercise in his own behalf. And such is the holding of the great preponderance of authority in this country.

VIII. Defense arising from non-disclosure by obligee of facts which he ought to reveal to the surety.

It is the duty of the creditor to disclose any information which he has concerning the principal which, if known to the assurer, might operate to prevent him from entering into a contract for such principal. To entitle the surety to defend on the ground of non-communication of facts it must appear that the facts not disclosed were material to the surety to know, such as would influence him to decline entering into the contract.

The surety having entered into the contract will be discharged therefrom if it turns out that the creditor having information affecting the beneficiary did not disclose it. If the creditor is applied to for information, or if he stands toward the assurer in a relation of confidence, failure on the creditor's part to disclose everything within his knowledge that is material for the answer to know is equivalent to an affirmative misrepresentation.

Bank v. Anierson, 65 Iowa 692, 22 N.W.R. 929.
Remington Sewing Machine Co. v. Kerzertee, 49 Wis. 409, 5 N.W.R. 809.
Harrison v. Lumbermen's Ins. Co. 8 Mo. App. 37.
Benton Co. Bank v. Boddicker, 105 Iowa 548, 75 N.W.R. 632.

"A contract of suretyship" says the court in this case, "is as a rule for the benefit of the creditor. He is, in dealing with the surety, to observe the utmost good faith, and if he fail to do so without a sufficient excuse for his neglect, the surety will be discharged to the extent to which he suffers by reason of the lack of good faith on part of the creditor. If the surety applies to the creditor for information respecting the principal which the creditor has and may properly give, but which he witholds without cause, or if he knowingly gives false information, he and not the surety should suffer the loss occasioned by the wrong."

It is not necessary for the surety to show in his defense that the concealment or failure to disclose material facts is wilful or with intent to deceive.

Railton v. Mathews et al., 10 Clark & Finley, 934.

In this case Railton, the appellant, became surety in a bond for the fidelity of one Hickes to his employers, the appellees. Appellant defended the action brought against him for the default of Hickes on the ground that the appellees (plaintiffs below), although well aware of the fraudulent conduct of Hickes in a previous employment by them, failed to make known this fact to the surety at the time he executed the bond. The trial court directed the jury that the concealment must be, first, of things known to the obligees in the bond or which they had strong and grave grounds to suspect; and, second, that the concealment must be wilfully and intentionally with a view to the advantage they were thereby to receive. This charge of the trial judge was strongly disapproved by the judges on appeal, by whom it was distinctly declared that the concealment need not be wilfully or intentionally, but that the concealment of facts material for the surety to know constituted a valid defense and the surety was discharged without reference to the motive which actuated the concealment.

The surety will no be discharged if the undisclosed facts were not known to the creditor. The creditor is responsible only for what he might have known. Duty to communicate facts does not reach beyond facts actually known by the creditor and does not extend to facts which he might have known by the exercise of reasonable care. Fraud will not be imputed to the creditor because through negligence and inattention to his own affairs he did not know of the facts which materially affected the surety's risks.

Lieberman v. First National Bank, 1 Harvel (Dela.) 367, 40 Atl. R. 382.
Topley v. Martin, 118 Mass. 275.

Other important cases bearing upon defenses embraced under this subdivision in addition to those already cited are

Smith et al. v. Bank, House of Lords, January 9th, 1813, 1 Dow 272.
Pitock et al. v. Bishop, 3 Law Jour. R.K.B. 109.
North British Co. v. Lloyd, 10 Exch. R. 523.
Lee et al. v. Jones, 17 Com. B. (N.S.) 482.
Sooy et al. v. State of New Jersey, 39 N.J.L. 135.
Bostwick v. Van Voorhis, 91 N.Y. 353.
Powers Drygoods Co. v. Harlan et al. 68 Minn. 193, ____ N.W. .

IX. Defense arising from the retention of the principal in service aft r knowledge of his dishonesty.

Good f ith on the prt of the obligee is required after the execution of the contract the same as before. The creditor owes to the promisor in a continuing or executory contract of suretyship the duty of disclosing to him such acts of the principal as materially affect the promisor's risk and for which the creditor himself might put an end to the main contract. And so the rule is, if the creditor having knowledge of the principal's dishonesty, retains the principal in his service without disclosing such knowledge to the promisor, the promisor will not be liable on his undertaking for the defaults occurring after the principal's dishonesty became known to the creditor. The leading case on this subject is

Phillips v. Foxhall, L.R. 7 Q.B. 666, (1872), Ames's Cases,295.

The defendant became surety to the extent of 50£ for the fidelity of one John Smith, a servant of plaintiff. Defendant pleaded that the servant made default in that period of his employment eighth day of June, 1869, the date of the assuring obligation, and the 20th day of November, 1869, on which day the default of the servant became known to the principal, who notwithstanding said default, continued the servant in her employ until the 4th day of April, 1871, and at no time prior to the ast mentioned date communicated to the defendant the fact of the servant's dishonesty, and because of these facts the defendant pleaded that he was not liable for the default after the 20th day of Nov. 1869, the day when the default became known to the employer. The defendant conceded his liability for the first period and paid into court an amount sufficientto cover the loss during that period. The plea was held good. The court said:

"We think that in the case of a continuing guaranty for the honesty of a servant, if the master discovers that the servant has been guilty of acts of dishonesty in the course of his service to which the guaranty relates, and if instead of dismissing the servant, as he may do, at once and without notice, he chooses to continue in his employ a dishonest servant without the knowledge or consent of the assurer, express or implied, he cannot afterwards have recourse to the surety to make good any loss which may arise from dishonesty of the servant during the subsequent service."

The rule of this case is followed without exception so far as I know.

Aetna Ins. Co. v. Fowler, 108 Mich. 557, 66 N.W. 470, Cases, 247.

Ignorance of the principal's dishonesty on the part of the obligee, even though reprehensible, does not discharge the surety, but he continues liable for the subsequent default of the principal. The test is the knowledge of the obligee, not gross neglect in not discovering or knowing the dis honesty of the principal.

Fielinghuysen v. Baldwin, 16 Fed. 452.

Phillips v. Bossord, 35 Fed. 99.

Colby v. Coon, 116 Mich. 208, 74 N.W. 519.

Retention by the obligee of the principal aft r knowledge of his morality in matters foreign to the subject of the suretyship does not relase the surety.

La Rose v. Logansport Bank, 102 Ind. 332.

X. Defense arising out of the fraud or misconduct of the principal toward the surety.

1. Where the fraud and misconduct consists of forgery. It now seems to be the established rule that fraud on the part of the principal in inducing the suretyship contract does not afford a defense to the surety if the creditor had no knowledge of the fraud and did not by his conduct assist in perpetrating it.

State v. Peck, 53 Me. 284.

Dair v. U.S. 16 Wallace 1.

An usual and common illustration of the fraud and misconduct of the principal arises out of cases in which the surety refuses o sign unless another will sign as co-surety, and the principal, to induce the making of the contr ct, forges the name of the co-surety.

Two theories have obtained respecting the liability of the surety under these circumstances. The first theory is that it is the duty of the creditor not to accept the obligation without such investigation as will disclose whether the signatures are genuine; that the surety signs upon the implied condition that no advancements will be made unless the contract is in fact what it purports to be, namely, the valid obligation of all the parties, and that the creditor had no right to remain in supine ignorance as to the character of a contract he has accepted. This theory has the support of

Sharp v. Allgood , 100 Ala. 183; 14 So. R. 16.

Cornell v. People, 37 Ill. App. 490.

In both these cases the sureties signed after the forgery. A much stronger case would seem to be made when the surety signs before the forgery, and so avoids the same charge of negligence imputed to the creditor. It would seem that there is no good reason why both are not subject to objection, the first, that by signing and delivering to the principal on condition that a

co-surety shall be procured, the surety makes the principal his agent; the second, that the surety ought not to require for his protection any greater care and diligence on the part of another than he is willing to exercise on his own behalf. The second theory, which is the most generally accepted and supported by the most satisfactory reasoning, is, that whether the signing by the surety is before or after the forgery, the paper comes to the creditor bearing the stamp of trust and confidence by the surety in the principal, and that the creditor should not suffer because of a breach of this confidence but the loss should rather fall upon one who held out to the principal as worthy of trust.

Stoner v. Millikin, 85 Ill. 218, Cases 252.
Butler v. U.S. 21 Wall. 88 U.S. 272, Cases, 250.

2. Where the fraus and misconduct consists of the breach of conditions the surety cannot, as a general rule, base a defense on the fact that the surety has signed upon the condition expressed solely to the principal, that the obligation should not be delivered or take effect until another had signed as co-security. A surety or guarantor is estopped from assorting a defense based upon his own neglect in failing to communicate the condition to his creditor.

Gibbs v. Johnson, 63 Mich. 671, 30 N.W.R. 343; (and other cases cited in note 163, p. 160, Stearns on Suretyship).

This view is opposed by some authorities on a somewhat technical application of the doctrine of special agency, the conclusion arrived at being that since the surety authorized the principal to make delivery of the paper only on condition and is a special agent, he cannot bind his principal, the promisor, except within the strict terms of his agency.

People v. Bostwick, 32 N.Y. 445.
King v. State, 81 Ala. 92, 8 So. R. 159.
Evans v. Daughtry, 84 Ala. 68, 4 So. R. 592.
State v. Allen, 69 Miss. 508, 10 So. R. 473.

If the body of the bond or other instrument contains the names of co-obligors whose names do not appear as signers, such a circumstance is considered sufficient to put upon the creditor the burden of ascertaining whether the instrument is delivered in accordance with the understanding of the promisor.

Pawling v. U.S. 4 Cranch 219.
Allen v. Marney, 65 Ind. 398.
Hessel v. Johnson, 63 Mich. 623, 30 N.W. 209.
Ward v. Churn, 18 Gratt. 801.
Contra, Grim v. Jackson Township, 51 Pa. 219.
See Whittaker v. Richards, 134 Pa. St. 191, 19 Atl. 501. Also Johnson v. Weatherwax, 9 Kan. 75.

It has been held that in the absence of express authority the doctrine of implied agency does not reach the amount of the penalty in the bond, and such blanks being filled by the principal will not bind the surety.

Famulener v. Anderson et al. 10 Ohio St. 473.
Rhea v. Gibson, 10 Gratt. 215.

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L E C T U R E S

ON

S A L E S.

BY

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LECTURE I

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The term property is used in the law in two senses. We are quite apt to speak of the thing as property. A better use of the word however, signifies the right which one has to or in a thing. And so we may define property as the right in the owner to freely use and dispose of the subject of the property at his will.

There are two classes of property - real and personal. Real property is such as pertains to things which are permanent, fixed, lacking mobility, as lands. Personal property is such as pertains to all other things. Personal property includes some interests in real property. Chattels real are personal property, and they are all interests in real property less than freehold interests. The primary characteristic of personal property is its mobility. This may be either actual mobility, or what we may call constructive mobility. We speak of the mobility which might pertain to a watch, for instance, as being actual. On the other hand, we might speak of the indebtedness which one person owes to another as being subject only to constructive mobility ; it is not a tangible thing which we can take actual possession of. Another characteristic of personal property is that under the general rules of law it passes to the personal representative rather than to the heir upon the death of the owner. Actions respecting personal property are not local, but wherever the owner may be, there may action be brought respecting it; whereas in the case of real property the action ordinarily must be brought in the jurisdiction in which the property is.. We may notice also as we pass that contracts respecting personal property are not necessarily in writing. On the other hand if we are to convey an interest in real property, it can only be done in writing. You might notice too that personal property is not subject to dower rights. In the last place, we notice that except as to chattels real, the law of the owner's domicile will control as to its disposition or transfer.

We may very readily change property from personal to real. We may instance the growing trees upon the land. As they stand upon the land they are real property; but as soon as they are severed from the land they become personal property.

We may speak now more particularly of Personal Property, and the first division we will make of it, willbe into chattels real and chattels personal. Chattels real, as I have indicated to you, are principally leasehold interests. Chattels personal are all other species of personal property than chattels real.

We may subdivide again, and say that chattels personal are either choses in possession or choses in action. We may say of choses in possession that they are such things that we may affirm of them that we have both the right and the possession; while choses in action have no visible existence. They are really rights depending upon legal recognition.

With this general discussion, I may now discuss some particular species of property which have rules peculiar to themselves; and let me in a very brief way speak of fixtures as the first of these; the class of property which is on the border line between personal and real. It is somewhat difficult of definition, but we may say, I think with accuracy, that a fixture is a chattel actually or constructively fixed to land.

The character of a fixture may be determined by one or all of the following considerations:

1 - Its method of annexation.
2 - The purpose and use of the thing.
3 - The intention of the parties.
4 - The legal relationship of the parties.

The following rules will be of assistance in determining whether a particular property is a fixture or not.

1st - Annexation to the land, actual or constructive, is necessary to a fixture. A case which will give you an idea of what constructive annexation is, is that of Voorhees vs.Freeman, 2nd Watts &Sardon Penna. Reports, page 116.

2nd. Things actually attached are fixtures. This is only a general rule, subject to may exceptions, dependent upon the other considerations which I have suggested to you before.

3rd - Things necessary to the carrying out of the purposes for which the lands are generally used,are fixtures though temporarily detached.

4th - The intention of the parties making the annexation will usually control. This intention must be evidenced, either by the nature of the thing annexed, by the relationship and situation of the party making it, or by the method of annexation. As I have already indicated to you, a special contract between the parties will control, not only as between them, but as between either of these persons and a third person who may acquire subsequent interests in the property, with notice of such contract.

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LECTURE II

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I speak first this morning of what are known as soil products. The primary classification which we have in law of these soil products divides them into two classes: fructus industirales and fructus naturales. Fructus industrales are those products of the soil which are the result of cultivation, like, wheat, corn oats, etc. Fructus naturales are those soil products which are perennial, which do not require the periodical bestowal of labor by man, like growing trees, shrubs, etc.

Speaking of the first class we may say that these are real property while growing on the land, or have not been severed from it. Tripp vs. Hasceid 20 Mich. 254.
4th Mich. Reports, 388.
When severed from the soil they become personality. But while these are regarded as real property while growing on the land or standing unsevered upon it, still for some purposes they may be treated in the law as personal property and that independent of statutory regulations. Such was the rule at common law that growing crops might be levied upon. We find statutes upon this subject in most of the states, and it is generally considered that unless there is a specific statute to the contrary, growing crops may be levied upon as personal property. Of course we must have regard for the relationship of the parties.
47 Michigan 22
41 American Reports 706.

Now as to emblements. The right to emblements is the right of a tenant for an indefinite term to take off the crops planted by him, after his term shall have expired, when they mature after such expiration. In order to possess this right, the interest of the tenant must be of such a character that he can not tell at what time it may expire. This is not a right which pertains to the class of soil products known as fructus naturales, for the reason that they are really not the result of his own labor, and he stands in no such relation to them as he does to crops planted by himself.

Referring now to the second class of soil products, which are not the result of the labor of man bestowed upon them from year to year. These like the others are real estate while standing on the soil, and become personalty upon being severed. This severence of which I speak may be either actual or constructive, and this is true whether it be a soil product of one class or the other. By actual severence we understand the actual or

physical taking of the product from the soil; and constructive severance resultys where the parties by their conduct have treated the property as personal property. For instance, a man makes a conveyance of his lands, reserving the timber growing upon the land, agreeing to take it off within a certain period. That will operate as a severance and from that time the property may be treated by them as personal property. However, if a third person intervened, and there was no notice given to the third person, this transaction would not have the same effect against the third person.

Under the law in England as it now prevails, a sale of growing timber, where it contemplates an immediate severance, will not be regarded as a sale of the interest in the lands, but as a sale of personal property, and need not necessarily be made in writing, as it must be if it is treated as a sale of interest in the land. But if it be true that the sale of the ~~xxxxxxx~~ timber contemplates that it shall stand for some time, it will be considered even in England as a sale of interest in the land.

Marshall vs.Green, Law Reports 1st Com. Please Div. page 35.
35 Law Times Report 404.

I come to speak now for a few minutes of what are known as trademarks. We may define a trade mark as the name, figure, letter, symbol or device adopted or used by a manufacturer or merchant to designate the goods he manufactures or sells, and to distinguish them from like goods.

You will notice in the first place that it is not essential that the person should be a manufacturer in order that he may have trademark rights. A merchant also may put upon the goods he buys a trade mark of his own and be protected in the use of that trademark.

There are some names of things which can not be used and will not be protected as trade marks. Such are words, expressing quality, kind, composition or utility, mode of manufacture, or geographical terms.

Royal Baking Powder Co. vs.Sherrell. 93 N.Y.331
Smithvs.Walker, 57 Michigan 456
Canal Co. vs.Clark, 13 Wallace 311

The owner must have the exclusive right in the thing to which the trade mark is applied.

Use also is essential. A person can not determine in his own mind, or announce to the public, that he purposes to use some time in the future a particular symbol or device as a trademark and be protected in it.

That which is used as a trade mark must be novel as applied to the same class of goods.

Voxey vs.Ching, 143 Mass.592
58th American Reports 149.

Now as to the violation or infringement of trademark rights. It is not essential in order that the law will say there has been a violation of such rights that the exact symbol, words, or device shall be used by another,but it is enough if there be used such symbol or such words as might naturally deceive the public as they ordinarily come to deal in that article.

Royal Baking Powder Co. vs. Davis, 26 Federal Reporter, 293.
Royal Baking Powder Co. vs. McQuade, Price's American Trade Mark Cases 401.
Williams vs.Brooks 50 Connecticut 284 and 47th American Reports 642.

Let me speak for a little time of the law of patents. A patent is a grant by the general government of the exclusive privilege of making, using and vending, and of authorizing others to make, use and vend, an invention.

The authority for the granting of the right by the general government is found is in the Federal Constitution Sec.8 Art.1.

Now what is essential that the invention may be entitled to this protection?

1st, It must be new; by that I mean, the result or method of reaching the result must be novel.

2nd, The conception must be embodied in an art, machine, manufacture, or composition of matter. Justice Story has laid down this rule in the case of Washburn vs.Gould, 3rd Story 122.

3rd, The invention must consist in something more than a new use for a thing not novel.

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Sept.28th,1900

LECTURE III

---oOo---

I have spoken of several of the essentials of the right to a patent, and come now to speak of the

4th. The invention must be useful. The degree of utility is unimportant, so long as it is not intended to be used in some illegal transaction.

Bedford v.Hunt, 1st Mason 301.

5th, The invention must not have been used; that is, reduced to a condition where the public have had opportunity to profit by it. I shall call your attention a little further on to a statutory provision which will show that a certain amount of use is consistent with this statement. A machine may have been constructed as an experiment, but not have been put out for the use of the public, in which case the inventor would not lose his right to have it patented. It is not enough that one should have a mental perception that he in his mind may have invented that which if it were reduced to a practical machine would be patented. He must have made his machine before he can ask to be protected by a patent right.

6th, The revised Statutes of the U.S. Sec.4886, state: "The invention must not have been patented or described in any printed publication in this or any foreign country before the invention was discovered by the one claiming rights as the inventor, and it must not have been in public use or on sale for more than two years prior to the application for the patent."

7th, The application for a patent must describe in detail the discovery or invention, so that another could construct or produce the result of the invention or discovery. While the allowance of a patent by the Commissioner of Patents grants prima facie rights, yet it is not conclusive of the rights which it purports to give. In other words, it may be invalidated by a subsequent investigation showing that there was fraud in obtaining it.

8th, The invention must be the discovery of the person who asks to have it patented. There may be an assignment of his rights, but after all, the discovery must be the discovery of the one who purports to discover it. If it be true that he has stolen the discovery of some one else, the patent would not be protected.

The life of a patent is 17 years, although under

special statutes patents for designs may be taken out for a less time, as the applicant may desire.

IMPROVEMENTS ON AN ORIGINAL INVENTION may be patented like the original. We must bear in mind, however, that while this is true, yet if it be a person other than the original inventor or patentee who has invented this improvement, he does not by patenting the improvement upon another's invention gain any right to that other invention, until the expiration of the 17 years, at which time this improvement may be attached to the machine of the original manufacturer, and in that way make the improvement valuable

A COMBINATION OF ARTICLES may be patented, and the fact that one or all of these particular articles have been before patented does not destroy this right. But it is true here also that the patentee of this combination does not by virtue of his patent gain any right as against the original patentees of these several articles. He must, if he makes use of his combination in the interest of the general public acquire these patent rights of the original articles which enter into this combination, or else wait until the original patents have expired.

A patentee may sell the whole or a particular interest or particular rights secured to him by his patent, either as extensive as the whole territory of the U.S. or over any defined lesser territory.

COPYRIGHTS. We may define a copyright as an exclusive right to multiply copies of a writing or work of art. We must bear in mind that there are two rights which are distinct, yet which are involved whenwe come to think of copyrights. An author has a right to his manuscript which is independent to the right to multiply copies of it. A man may own a fine picture and another have the right to multiply copies of it.

Stevens v.Cady, 14th Howard 528.

This right to the original manuscript or work of art is subject to assignment, but such asignment does not carry with it the right to multiply copies without consent.

Should the author publish without procuring his copyright, he has lost the right to procure this copyright.

Some interesting questions have grown out of this one, as to what is a publication. We may say that the printing of copies is not necessarily publication; neither is the printing of copies for the special purpose of distribution to particular friends.

Prince Albert v.Strange
1st McNaughton & Gordon, page 25.

The delivery of academic lectures is not publication.
36th Albany Law Journal 291.

There is some confusion in the law as to the rights as between the writer and receiver of letters, but I think we may say, although there are some conflicts, that the essential right of property is in the receiver, but the right to control publication is in the writer.

Falsom v.Marsh, 2nd Story 100
Pope v. Curl, 2nd Atkins 342
Thompson v.Stanhope,Amblers Cases 737
Grigsby v. Breckenridge,2nd Busch 480

PICTURES The artist who paints, or the subsequent owner of a picture, may prohibit copying or publishing. The picture may be produced by the artist in any other way.

A public exhibition is not a publication of the picture.

As to photographs, the photographer has the general property in the negative, but he may not sellor exhibit copies without the consent of his customer. There is an interesting artice on this subject in the 4th Harvard Law Review page 193.

Pollard v.Photographic Co. Law Reports 40th
Chancery Div. 345.
Horace v. Walker Co. 64 Fed.Rep. 280
Atkinson v.Doherty, 80 N.W.Rep.285.

PLAYS, OPERAS, AND DRAMATIC WORKS. There are here two distinct rights the right of multiplying copies and the right of public performance.

The right of multiplying copies can be acquired only by a resident author.

The exclusive right of public performance may be acquired from a non-resident author where there has been no publication. Yet a non-resident author could not himself procure a copyright upon his dramatic works.

Tomkins v. Halleck 133 Mass.32
43 Amer.Rep.480

A public performance is not a dedication to the public, but may be the exercise of a right which the propriter has himself.

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Oct.4th, 1900

LECTURE IV

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Continuing our talk about Plays and dramatic productions, you remember we learned there are two distinct rights growing out of the production of these dramatic compositions: the right to multiply copies of the work and the right of public performance.

The right of public performance may be held by a resident author or his assigns, and this right is independent of whether there has been a publication or not.

13 Blatchford 47

The author or owner of an unpublished play, and the owner of a copyrighted play have the exclusive right to authorize public performances. We should bear in mind that there are two sources of right,-one grows out of the law of copyrights and exists under statute, and the other is a common law right.

2nd Bissell 34

This right of protection extends not alone to the words of the play but as well to the action of the play, the directions for the presentation of the play, etc.

Daly v.Palmer, 6 Blatchford 256

A right in an unpublished play is a right at common law.

A right in a published play is statutory.

When I speak of a published as distinguished from an unpublished play, I mean a play put before the publick so that any one at his pleasure may have the benefit of it, and not the production on the platform.

The following is a case growing out of the authorship of musical productions.

Carte v.Duck, 25 Fed.Reporter 183

SUBJECTS OF COPYRIGHTS. You may find a list of the subjects of copyrights in the revised statutes under this general head of copyrights. I may speak however of some special subjects of copyrights.

1st. A new compilation of old material may be copyrighted.

2nd. Translations of a foreign language are the subject of copyright. The fact that one has produced a translation of such a work and procured a copyright upon it, does not prevent another from doing the same thing, although of course he can not take the translation of the first, without his consent. It willbe quite apparent that a mere reprint of a foreign book could not be copyrighted.

3rd. Photographs may be copyrighted. This is by virtue of the direct language of the statute.

Lithographic Co. v. Cerrone 111 U.S.53.

ESSENTIALS OF A COPYRIGHT. As I have indicated to you, only residents are entitled to a copyright. In order to secure a copyright, I suggest to you three things as essential:

1st. There must be mailed or delivered to the Librarian of Congress a printed title of the book, pamphlet or paper, or a description of the painting or model.

2nd. Within ten days after publication, there must be delivered or mailed to the Librarian of Congress two copies of the book, or literary production whatever it may be; or in case of a painting or statue, a photograph of it.

3rd. In the case of a book or literary production, there must be a copyright notice on the title or succeeding page.

A failure to deposit with the librarian whatever may be the subject of copyright within a reasonable time after this title page has been delivered, will be held to be an abandonment of such rights as may have been secured by the delivery of the title page.

The term of a copyright is 28 years. There is also a right of renewal upon statutory conditions.

New editions may be put out under the protection of the first copyright, but in order that they may be protected by this copyright, they must be duplicates of the first edition.

INFRINGEMENT OC COPYRIGHTS. It follows from what I have already said that in order that there may be an infringement of this copyright, it is not essential that there be an actual reproduction of the exact words or an exact duplicate; but it is enough if there be put out something which is naturally inclined to deceive the public.

Gilmore v. Anderson, 38 Fed.Rep.846

A fair abridgement is not an infringement. An abridgement means the use of peculiar skill in taking from an extended work the heart of it and putting it into a smallproduction, so that the new production is a different thing from the old.

Webb v.Powers, 2nd Woodbury & Minot 497.

ASSIGNMENT OE COPYRIGHTS. The provision of the statute is that an assignment oc copyrights must be in writing. Sec.4595. But it is sufficient as between the original parties though not in writing. A may verbally transfer his copyright privileges to B, and B would be protected in the right against A, but he would not be protected in such right as against C who may have acquired otherwise a right from A.

Callaghan v.Myers 128 U.S. 617. For this particular proposition, page 658 of the opinion.

ASSIGNMENT OF COPYRIGHTS.

Webb v.

THE REMEDIES FOR INFRINGEMENT may be three:

1st. An action for damages.

2nd. A prosecution for the penalty provided by the statute.

3rd. The remedy in equity. This last remedy is the one ordinarily pursued, because it has the effect both of stopping future infringement, and also giving damages for what has been done.

With this outline we pass the subject of copyrights.

ANIMALS AND PROPERTY RIGHTS IN THEM. For our discussion we divide them into two classes: wild and domestic.

Property in wild animals is qualified in its nature, and may arise in one of three ways:

1st. Through actual possession and dominion.

2nd. Because the young of the wild animals are on the land of the person and are too young to rome at will.

3rd 3rd. The right of hunting; that is, the right of the owner of the lands to hunt and kill wild animals upon his own premises.

Speaking briefly of each of these ways in which property arises in wild animals, we may say generally that while wild animals are actually in possession of a person he is the owner of them, but this ownership differs from that which one may have in domestic animals, in that in the wild animals if they once escape and regain their freedom the property is gone, whereas, if it had been a domestic animal that had escaped, the title would not change.

We may have this particular right of which I have been speaking when the animal is actually in possession in the sense that it is restrained forcibly, or by reason of the animal having been tamed; but if it should subsequently regain its natural freedom, it would be subjected to the same rules of law as in the first instance had it not been tamed. Illustrations of this right are found in bees, doves, etc.

23 Albany Law Journal 482.
69th Georgia 447
47 Amer. Reports 764

The right which arises because wild animals are so young as to be unable to rome at will is one which continues in the owner of the soil only so long as the disability continues. Bishop Criminal Law, pag 757 to 781.

It was held in the case of Commonwealth vs. Chase, 9th Pickering 15, that doves away from home were not the subject of larceny.

The right of hunting is the exclusive right in the owner of the land. Ferguson vs. Miller, 1st Cowen 243.

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Oct. 5, 1900

LECTURE V

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I think I omitted to call your attention, when speaking on the subject of copyright, to the fact that under a provision of a law of Congress which was passed within a very few years, the power was put into the hands of the President of the U.S. to negotiate copyright relations with foreign countries, so that non-residents might have the advantage of copyrights in this country, and American citizens in those countries. Under that law, copyright relations have been established with most of the important foreign countries.

When we closed the last lecture, I was speaking of animals and particularly wild animals. Mr.Bishop tells us that at the common law, animals were not the subject of larceny unless they were such as were fit for food, and known as game. I think that that is the general rule. The State has the power to limit this right to kill which we have spoken of, and under this power have been passed what are known as our game laws. The theory under which the state enacts statutes for the protection of game is that they are subject to the general welfare provisions. That question was up in the case of State vs. North, 45 Vermont 258

The carcas of a dead wild animal is subject of property, like any other inanimate object.

I think we may say that under the modern rule DOGS are domestic rather than wild animals. You may find two views of this question in these cases:

State vs.McDuffy, 34 N.H.523 & 69 Am.Decisions 576

State vs. Harriman, 75 Maine 562; 46 Am.Rep 423.

DOMESTIC ANIMALS. There may exist in domestic animals the same property rights as in inanimate objects. The increase of a domestic animal belongs to the owner of the female. As between the mortgagor and mortgagee of domestic animals, the mortgagee will hold under his mortgage the increase of such animals as are brought forth during the pendency of the loan. There is a limit, however, as to whether this lein will obtain certainly as against a third person who becomes interested in such increase by way of purchase or mortgage or otherwise, after such animals have become so mature as not to be dependent on the dam or mother.

The owner of domestic animals is liable for their trespasses; and this is independent of the question whether he new of the vicious tendencies of the animal which may produce the trespass.

Vanhuwen vs.Lyke, 1st N.Y.Court of Appeals 515.

The owner of domestic animals known by him to be vicious is liable for their injuries whether they were trespassing or not.

Loomis vs.Terry, 17 Wendell 496.

THE RIGHT OF IMPOUNDING is a common law right, though now regulated almost entirely by statute. If animals are found trespassing on the lands of another, he may take custody of them and he has a lein upon them for the injury which they have done by so trespassing and for the expense of taking care of them. After a reasonable time, if not redeemed, he has a right to sell at public sale at such price as he may be able to get, and out of the proceeds of the sale, reimburse himself, the surplus to be turned over to the owner of the animals. Non one, however, should act under this rule without first consulting the statute of the particular state.

The question has often arisen as to what right, aside from this right of impounding, a person may have against a trespassing animal. He can only do that which is reasonable for him to do under the circumstances. He can not wilfully injure such animals, and so he may be responsible for injuries inflicted on trespassing domestic animals.

Tobin vs.Deal, 60 Wis.87; 50 Am.Reports 345.
Gillson vs.Fisk, 8 N.H.404.

GOOD WILL. This is a right which attaches to a business already established, and may be defined as the favor enjoyed by a particular shop or trade as indicated by its custom. It is based on the probability that old customers will continue to deal with the business house. So we say there is a personal right in what is known as good will.

It may be generall stated that the transfer of this right must be contemplated, or it will not pass with the transfer of the stock in trade.

You will not find all of the authorities agreed as to this, but the difference is not so much a difference in the principle, as in the application of it to particular cases. The circumstances surrounding a case may indicate that the parties intended the good will should pass, or the circumstances may indicate it was not so intended. The sale of good will has the effect to deprive the person who makes the sale of taking advantage of it after he has transferred it, by setting up in business in the same place

Pay vs.Pay, 43 N.J.Equity 433

The sale of a business and good will carries the right to use the business name.

But here it must be distinctly understood between the buyer and seller that the good will is part of the subject of sale. Some cases have held that it must be specifically

provided for in the contract of sale and shall not be left to be drawn by inference. Such a case is that of

Morgan vs.Schuyler 79 N.Y.490.

The sale of the good will does not of itself operate to bare the seller from engaging in the same business in the same town.

If a harware merchant in Ann Arbor sells his business and good will, the purchaser would have the right to use the firm name, but that would not deprive the seller of such business and good will from engaging inthe hardware business under some other name in the same town. The parties may contract in their sale that he shall not engage in the business in the same town, and he would be bound by that contract,but the mere sale of the business with the good will does not of itself operate to prevent him from engaging in that business under another name.

There is a law as you know against contracts in restraint of trade, and as to just what such contracts are is some imes a question of difficulty. But the contracts of which I have been speaking, if reasonable, will not be construed as within this inhibition, although a contracts which provides that a seller shall not go into business at all is within this inhibition and such a contract would not be upheld in law. The contract can not be unlimited in point of time or territory.

RIGHTS IN A DEAD HUMAN BODY We may say as a genefal proposition that there is no property in a dead human body. The law does not recognize it as property.

99 Mass.281 96 Amer.Decisions 759

It follows as a correallary to this proposition that one can not do, what many have attempted to do, dispose of his body by his will.

It follows also from this proposition that there can not be a larceny of such bodies. What we know as grave robbery is not larceny in the law. Such an offense would be prosecuted as a trespass, or under particular statutory provisions.

The right of burial belongs to the next of kin. By this is meant that the next of kin can control the place of burial and the circumstances of burial. This does not depend upon the property right in the body.

Weld vs.Walker, 130 Mass.422; 39 Amer.Rep.465

PROPERTY IN ICE. This species of personal property stands in a measure by itself. We may understand, I think, that ice belongs to the riparian owner, that is, to the owner of the land bordering the water in which it forms. A sale of it is a sale of personal property.

Bigelow vs.Shaw, 65 Mich.340; 8 Amer.State Rep. 902
Lorman vs.Benson, 8 Mich.18; 77 Amer.Decisions 435

The specific question whether the sale of ice was a sale of personal property rather than that of real estate, which would require the contract of sale to be in writing, was involved in the case of Higgins vs. Musterer, 41 Mich. 368; 32 Amer.Reports 160.

GIFTS OF PERSONAL PROPERTY. A gift is a voluntary and gratuitous alienation of ones property. There are two kinds: inter vivos and causa mortis.

In the first place, let us consider gifts generally without reference to either class. A gift is not a contract; that is, the property in the subject of it does not pass by virtue of an obligation which the law will enforce. There may be a moral obligation upon a person to give his property to one person rather than another, but there is no legal obligation which furnishes the foundation for a gift.

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Oct.11th, 1900

LECTURE VI

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Continuing the discussion of the method of transferring personal property which we call transfer by gifts, you will remember we had divded gifts into two classes; inter vivos and causa mortis, and were about to suggest some general propositions on the subject of gifts generally. The first proposition I had suggested was that the title passes not by virtue of a contract or legal obligation, but it is a voluntary transfer without compensation.

A gift must be complete in itself and not require the aid of the law to complete it.

In other words, a person can not put himself in a position where he is under obligation to make a gift and the law enforce that obligation.

All kinds of corporeal property and incorporeal as well, are proper subjects of gift.

A man may make the gift of a promissory note, the same as he may of a horse.

ESSENTIALS OF GIFTS INTER VIVOS.

1st. There must be property.

2nd. There must be living parties.

3rd A declared intention on the part of the owner to deprive himself of property and bestow it upon another without consideration.

4th. Delivery of the property by the owner to that other with such intention.

5th. Acceptance by that other.

When I state that all classes of personal property may the subject of gifts, I do not mean that under all circumstances can a person make a gift of property which he may have. If a person has stolen property, he can not pass title by gift to another; and if a man's property is needed to satisfy his creditors, they are entitled to it as against any person who takes it as a gift. In other words, a person must be just before he is generous.

It does not follow from what I have just said that a person who is indebted can not make a gift. If he is solvent, he may make a gift which will stand, even though at a subsequent date the donor become insolvent.

A man may be able to meet obligations as they are presented, and therefore solvent in the law, and yet actually make gifts of his property in contemplation of insolvency. Such gifts will not stand in the law.

stand in the law.

I have said that a gift must be complete between living parties. It is not enough that one shall say to another that when I am dead I desire you to have this property. He may dispose of it in his will, but he can not make a gift of that sort inter vivos. A gift inter vivos must be a gift which is completed; all essentials having been met by that the parties have done while both are living.

A legacy is a gift which does not meet this requirement; that is, it is not completed between living parties; and therefore it is not a gift inter vivos.

I have said that the intention to make the gift must be disclosed. The mere delivery of possession with the intention on the part of the donor to make the gift is not enough; that intention must be disclosed.

I do not mean to say that this intention must be disclosed in precise words. It is enough if there are circumstances surrounding the transaction which speak that intention of themselves.

Williams' Appeal, 106 Pa.State Reports 116
51 Amer.Reports 505
Fiero vs.Fiero, 2nd Hun (N.Y) 600

THE QUESTION OF UNDUE INFLUENCE is one qhich arises in connection with transfers of property in this way. A person in order to make a gift must do it as the result of his own action, and if he is so under the control of another that the action is not his own and he is simply the instrument of another, it is not a gift. This does not carry with it the extreme conclusion that if another exercise influence over the donor that the gift is destroyed. A person may exercise influence over another and persuade him that it is his moral duty to make a particular gift, and it is a good gift if the person who made the gift under those circumstances after all acted upon his own judgment.

Herster vs.Herster 122 Pa.State 239
9 Amer.State Rep.95

I think it may be laid down as a general rule, that where there is a claimed gift between persons sustaining some confidential relation, that the burden is upon the donee to establish the entire fairness of the transaction.

I have said there must be delivery to accomplish this gift. This is a primary requisite. But it may be either mediate or immediate; actual or constructive.

I have

Delivery is investing with power to control.
31 American Decisions 563.

It follows from this that if the power to control is not complete in the donee there is no gift. If, in other words, the donor shou d say that I want you to take this and if I die it shallbe yours, holding in himself still the right to control, there is no gift.

If the person to whom delivery is made is a third person, and if that person is not the agent in law of the donee, but is really the agent of the donor, there is no delivery; but if he stands as agent of the donee there is a gift accomplished,
74 Mo.195

There is some conflict in authority as to what will amount to a constructive delivery so as to establish a gift, some holding that the dilivery shall be all tha the circumstances surrounding the parties at the time will permit of. The general rule, however, seems not to require an actual delivery when a constructive delivery might be made at the time. There is a case which has gone as far as any in sustaining a gift when it was a question of whether there had been delivery or not at 31 Mich. 185.

This requireme.t of delivery seems not to be held so strictly as between persons holding confidential relations.

The circumstances are quite apt to be such that an actual change of possession would not be effected under the circumstances.

Love vs.Francis, 65 Mich.181
6 Amer.State Rep.290
Hillebrand vs.Brauer, 6 Tex.45; 55 Am.Dec.757
21 Pickering 385; 40 Mich.25.

A common method by which gifts are made is by subscription. A subscription may be revoked up to the time it is acted upon. But if it has been acted upon, and if another has taken action upon the faith of that subscription, it becomes binding as a contract.

Forgiving ak debtk is another form of gift . Ordinarly a statement to the effect that there is a forgiving of the debt, or delivery over of that which was the evidence of the debt, or something of that sort, would be required in order that a gift made in this way would be sustained.

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Oct.12, 1900

LECTURE VII

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A gift inter vivos once completed is not subject to revocation. I may say also that gifts upon conditions are sometimes upheld in the law. An illustrative case is

21 Pickering 325

I said there must be acceptance, and suggested that acceptance was merely an element of delivery. By acceptance I mean a manifestation of willingness to take control. If a gift is beneficial the law willpresume acceptance.

GIFTS CAUSA MORTIS. As the name indicates these are gifts made in contemplation of and induced by the fact that the death of the donor is by him believed to be imminent.

I may say here that all the essentials of gifts inter vivos are essential here except that the gift is upon particular conditions, and these conditions are as follows:

1st. Death shall be believed to be imminent either from disease already existing or peril presently apprehended.

2rd. It is essential that the donor shall die as the result of the disease or peril as he believed he would.

3rd. The gift must be induced by the fact that death is believed to be imminent.

4th. The gift is subject to revocation at any time before death.

This expectation of death which must lie a the foundation of a gift causa mortis must be a reasonable expectation of death upon the part of the donor, which is apprehended from a disease which is then fastened upon him, and the disease must be of such a character as to lead him to think that death not only was coming some time as the result of that disease, but that it was immient and might be expected at any time; or it may arise from peril apprehended. It is not every peril to which a man may subject himself which will furnish the foundation of this right. He may enlist as a soldier, but that enlistment does not of itself put him in a position where he can make this gift causa mortis; but if he were about to go into a battle where he might reasonably fear that he would be killed, he may make this gift causa mortis.

Smith vs.Dorsey, 38 Ind.451; 10 Am.Rep.118

I have said that death must occur as expected in order that the gift willbe good. If the per l is escaped, the gift will not stand, even though death may occur from some other cause. The cause which induced the person to make the gift must be the one which results in death

It follows from what I have said that a person in extremis may make a gift which will not be causa mortis. He make a gift inter vivos where he might have made a gift causa mortis. A person under those circumstances may accomplish a gift by reason of actual delivery of the property. Such a gift is not a gift causa mortis, though it may have been made under fear of death. A gift causa mortis must be one in which the donor intends that the gift shall be accomplished if he dies, and if not, it shall not be. I do not want you to think that because a person makes a gift with that condition that it would stand as a gift causa mortis necessarily, because there must be this imminent peril at the time in order that there may be a gift of this kind. If the gift is not induced by peril, even though the peril may exist, it is not a gift causa mortis.

Gifts causa mortis are defeated in either of the following ways:

1st. By the escape from peril.
2nd. By the death of the donee before that of the donor.
3rd. Deficiency of estate to pay indebtedness.
4th. By actual revocation by act of the donor

I have said that death must occur substantially as apprehended. There are many cases that may be found to illustrate this.

49 N.Y. 17; 10 Amer.Rep.313

I come now to speak of the interests one may have in personal property as owner.

One may own in severalty; in common; in joint tenancy; and by entireties.

Holding in severalty is where a person holds all the interest to the exclusion of any interest in any one else. This is the common method by which we hold property.

The tenancy in common arises where two or more persons own interests in the same property, neither as joint tenants nor tenants by entirety.

This tenancy is distinguished from the tenancy in severalty because two or more persons own interests in the same property, and it is distinguished from the other classes of tenancies by the fact that but one unity is essential, and that is the unity of possession.

A joint tenancy is where two or more persons acquire equal interests in the same property by the same transaction.

Here there are four unities essential: unity of time, possession, title and interest.

Holding by entirety is where property is taken by husband and wife under such circumstances as except for such relation they would hold as joint tenants.

Tenants in severalty may dispose of their interests at will; and so may a tenant in common.

The effect of the disposition of the interest of a joint tenant is to destroy this joint tenancy, because by the fact that there is a disposition of this joint interest, there is a destruction of some of these unities which are essential to the joint estate.

A tenant by entirety can not dispose of his or her interest except by joint action with the co-tenant.

There is no right of survivorship which attaches to tenancy in common. The contrary is true of joint tenants and tenants by entirety. Here the survivors take the interest of the deceased.

This right of survivorship logically, as you can see, carries this conclusion: that the property which one holds as a joint tenant or tenant by entirety can not be reached by the creditors of such joint tenant or tenant by entirety.

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Oct.12, 1900

L E C T U R E S

O N

T O R T S .

B Y

PROF. BRADLEY M. THOMPSON, M.S. LL.B.

Reported by A. C. Heckler.

U N I V E R S I T Y O F M I C H I G A N.

Law Class of 1903.

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1901.

LECTURE I.

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You have been over the subject of Torts in the text book and these lectures simply cover certain features of torts not dwelt upon in the text book by Judge Cooley.

The following principle lies at the foundation of every action to recover damages for a tort:

Whoever does an injury to another is liable in damages to the extent of that injury, it matters not whether the injury is to the property, the person or reputation of another.

4 Mason 115.

There is an apparent exception to this general proposition that a person is always liable if he injures another:-

If one in the reasonable enjoyment of his own property incidentally by reason of such reasonable use injures another he is not liable. What is a reasonable use depends upon all the surrounding circumstances.

Another class of cases arises from inventions. A by his invention may make B's property or trade worthless, but B has no right of action.

Again A may make use of his property in a manner that is perfectly lawful, but which at the same time greatly injures the value of B's adjoining property. In all such and like cases the loss is damnum absque injuria.

Some courts have gone to the length of holding that if the use to which a persons puts his property is legal, his motive in using his property will not be enquired into and he will not be liable for any resulting injury although the act was done wantonly and maliciously with the sole purpose of injuring another.

The common law rule is to the effect that if a man has property he may use it in a lawful way, and the result of his using it in a lawful way can not give a right of action to any one else. It is no matter what the motive was with which the party used his property. The sole question that the common law courts examine into is, had the party a right to make that use of his property. If he had, that is the end of the controversy.

13 Wendell 261 72 N.Y. 89
28 Vt. 49 68 Ill. 478.

The civil law rule was to the effect that a man had a right to use his property in a reasonable way if it was for his benefit, but he had no right to use it at all simply and

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solely to injure his neighbor. In other words, the civil law contemplated that a manhad a right to use his property because the property was of some benefit to him, and therefore he could use it in any reasonable way if it was for his benefit, but that he had no property which gave him the right to injure his neighbor, and consequently if he used his property not to benefit himself but to injure a third person he was liable for the injury.

Now some of the states have adopted the civil law rule. The prevailing rule in this country is the common law rule which I have given you. Michigan has adopted the civil law rule.

69 Mich. 380 81 Mich. 52

95 Mich. 543

It is not necessary for you to examine any more than the case at 69 Mich. 380, because you will find there a full discussion of these two principles and reference to many of the decisions on both sides of this question. Two judges gave a decision sustaining the common law rule and two gave a decision for the civil law rule. The case went up on writ of error from the lower court which held to the civil law rule,and since the upper court was equally divided, the decision of the lower court was sustained.

One is not permitted, however, to make such a use of his own property that another's property is thereby changed modified or interfered with to its detriment. In other words, while under the common law you have a right to use your property in any legitimate way, you can not use your property in that way if its use modifies the condition of the adjoining property, changes the property itself.

48 Ohio St. 42

This was a case where a man was mining coal and the coal that was prepared for the market required certain refuse to be taken out, and this refuse was piled up near a stream and in the Spring when the stream overflowed its banks it washed the refuse into the stream and the water carried it on to the neighbor's land. You will notice that the use of the land for mining coal was a proper and legitimate use for the benefit of the owner of the mine. The complaint that was made against him was that he piled it so near the stream that when the water of the stream overflowed it would wash the refuse down on the neighbor's land. The court held he ought to have known and probably did know that that would be the natural effect and that he had no right to make that use of his land, and was liable for the damage.

TORTS DUE TO DECEPTION are naturally evil, malumin se. Consequently they are abhorrent to the law and if damage results there is always a good cause of action. The law always requires that where a suit is brought the party bringing the suit must show that he has been injured. Dames in certain cases will be implied, as certain forms of slander.

Consequently if a man represents to you fraudulently a certain set of facts and you do not act upon his advice, you can not bring suit against him for his wrong to you; but if he made false and fraudulent representations which you had a right to act upon and you have acted upon them and been injured on account of their being false, the two combined always give a right of action.

3 Bulstrode 94

It was in this case that Justice Croke announced this doctrine that fraud without damage, or damage without fraud, gave no right of action; but where the two combined there was always a right of action. In this case a common carrier had agreed to carry certain wood. It was fraudulently represented to the carrier that the wood was of a certain weight. The wood was several times as heavy as represented, and acting upon the representations he injured both the vehicles he used and his team and he brought suit to recover the damages.

Where one merely induces another to break a contract without any deceit or through any conspiracy he is not liable, according to some decisions. The rule is not uniform.

48 N.Y. 43

But where one through fraud or deceit causes another to break a contract and damages result he is liable,under all authority.

66 N.Y. 82 2 Wendell 385

In the first case, A purchased cheese of B under contract. Before delivery C sent a false telegram saying A would not take the cheese. B sold to C. B brought action against C. The court held that he could recover as damages the difference between the price of the cheese B was to pay for it and its market value.

Where one induces another to enter into a contract by false representations and he thereby obtains some advantage, he will be liable for all damages the direct result of such contract.

150 N.Y. 176 34 Lawyers' Rep.An. 156

doctrine [illegible] or [illegible] [illegible]
[illegible] action. In [illegible] case [illegible] [illegible] [illegible]
[illegible] wood. It was [illegible] [illegible] [illegible]
[illegible] [illegible] heavy [illegible] [illegible] [illegible]
[illegible] [illegible] to [illegible]
More [illegible] [illegible] [illegible] [illegible]
[illegible] up [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible] [illegible] [illegible] [illegible]
[illegible] [illegible]

In this case A by false representations induced B to marry a woman of bad character. B brought suit agains A for the false and fraudulent representations in regard to the character of the woman, and the court held he could recover.

When a person by false representations induces another to enter into a contract and it is within his power to make such representations good, a court of equity will compell him to do so.

107 N.Y. 73 1 Wm.Blackstone 363
1 Brown's Ch. 543

In the first case the facts were these: A a testator died leaving two sons B & C. He left his property to B and C under these conditions, that if C died without issue the property should go to B, so that C did not take the fee absolute, he only took a life estate, the remainder was to go to his children if he had any,and if he had none the property would go to B. C sold the property to X. You will see that what X purchased under the warranty deed was the entire property provided C had children. Knowing what his rights were he went to a woman and induced her to marry C representing that if C had children the children would inherit the property. There was one child born and then upon C's death this child filed a bill in equity against X asking the court to decree that he deed the property over to her and she based that action upon the ground that her mother married C upon the representations of X that if a child was born the child would inherit the farm. The court held under those circumstances that X must make his representations good and deed the farm over.

You will notice that in the cases to which I have called your attention they are most of them marriage contracts. Anything which endangers the family is held to be hostile to the state. For that reason a person who injures the husband or wife or child by debauching one or the other, by selling drugs or liquors, or in any other manner whereby the husband or wife is injured in property or deprived of the society of the other, must answer in damages for the wrong he has committed.

119 N.C. 150 34 Lawyer's Rep. An.803
56 Barber 202

Each of these actions was based upon the common law and not upon the statute. In most of the states similar rights of action are given when the husband or wife has been injured through the sale of intoxicating liquors, but upon principle those actions could be maintained if there was no such statute upon the subject, and the reason for these statutes probably is that

they are broad enough to include the bondsmen of the liquor seller. There would be a right of action against the seller at the common law, but no right against the bondsman.

LIABILITY OF THIRD PERSONS FOR INTERFERING WITH PRIVATE CONTRACTS. I have already called your attention to those cases where a third person interfered with a contract for the purpose of benefitting himself. Now I refer to cases where third persons interfere apparently without any direct benefit to themselves. Suppose the third person reaps no advantage whatever but is a mere volunteer mischief maker. Then is he liable?

Upon that I give you the following problem:

A knows that a certain national bank is insolvent. He knows that B has $10,000.- which B wishes to invest. A goes to B and tells him that C has $10,000.- worth of stock in said bank which C wishes to sell. A assures B that the bank is perfectly sound and that the investment is perfectly safe. A's only motive for making these representations is to injure B. B buys the stock from C. The bank closes its doors the next day. The stock is worthless and the stockholders are obliged under the law to pay in to the receiver the full amount of the value of the stock. Is A liable to B?

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Feb. 15, 1901

L E C T U R E II.

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In this lecture I call your attention to the subject of INTERFERENCE WITH THE CONTRACTS OF OTHERS; and first as to CONTRACTS BETWEEN MASTER AND SERVANT. In most states the common lawforbids interference with any contract between master and servant, because in most of the states an early statute, a statute of the 13th century is the common law of this country. That statute was passed soon after the black death in England, when there was such a scarcity of labor that men were going from one manor to the other and contracts were being broken by persons wishing to have their lands cultivated; so that Parliament to prevent this interference with the contract between the land owner and the workmen passed statutes prohibiting such interference. Those statutes passed in the 13th century became the common law of this country, but not in all the states. In many of the states by statute they have fixed what shall be the common law. In this state in 1810 the Governor and Council passed an act repealing every statute of Great Britain that had been passed changing or modifying the common law. The validity of that statute has been recognized by the decisions of our courts, yet you will find in many of the cases that no attention is paid to it; and upon this very question I shall call your attention to a decision rendered only two years ago in which the court seemed to assume that this legislation passed in the 13th century to prevent interference with contract was in force in this state.

A person who wrongfully and maliciously, or with notice, procures a servant to break a contract for services, or harbors a servant after he has broken his contract and quit his master's service, is liable to the master for damages at the common law; or perhaps I ought to say under this statute of the 13th century, but that being an old statute we speak of it as the common law.

2 Ellis & Blackburn 217 70 N.C. 601

The first case cited is one of the leading cases on this subject. It was a case where a singer had contracted to sing and a third person induced her to break the contract; and the first question was of course whether the singer was a servant, for if she was not a servant she did not fall within the prohibition. The Chief Justice held she was not a servant, but the majority of the judges held that she was a servant and that for causing her to break the contract the parties were liable.

When a person does an act which in law and in fact is a wrongful act, and when the natural and probable consequence of such act will injure another, and does so injure him, such a person is liable.

Law Reports 16 Bench Div. 683
107 Mass. 555
76 N.C. 355

In this first case a person had special knowledge of the manufacture of glazed brick. He contracted to work for one B exclusively for five years. C induced the party to break his contract and B brought action against C for damages. The court held that C was liable. Lord Colburn dissented, holding that there was no right on the part of B which had been invaded by C.

In the Massachussetts case action was brought against the members of a labor union, for injuring the business of the plaintiff by inducing men to break their contract. The declaration was demurred to and the court held that it was good, that is, if the facts stated in the declaration were true the plaintiff had a cause of action.

This whole question is not free from embarrassment. Commerce, buying and selling, are the very life-blood of civilization and there must necessarily be competition. Competition is not only lawful but it is necessary.There are some decisions that hold that if a breach of contract come under the head of competition and the breach is due to competition, the motive of the third person who has brought about the breach is wholly immaterial, provided his conduct has been free from fraud, deceit, and violence.

Of course that is an assertion of the common law rule which I gave you in the last lecture. I also gave you the civil law rule, which says that there are two questions to be answered: 1st, might the person do this act if it was done for his own benefit;and 2nd, was it really done for his own benefit.

91 Ky. 121 91 Ky. 131
98 Calif. 578 21 Lawyers Rep. An. 233

In all these cases it was held that although there was an interference with contracts , that the damages that resulted from such interference could not be recovered.

In the first case a planter had contracted to sell his tobacco to a firm B & C, and a third person in order to injure B & C.having no interest in the contract,induced the planter to break his contract, and the court held he was not liable.

It would seem that the weight of authority upon this branch of the subject sustains the doctrine that if a third person induces another to break a contract of service he is liable for the resulting damage. That is, I think the weight of authority is with the first case cited, 2 Ellis & Blackburn, although it is still unsettled. You will notice those are contracts not for the sale of merchandise, but between individuals.

If the contract is for the sale of merchandise, either fraud or deceit is used, and the breach arises as one of the incidents that may be anticipated from competition in trade, such a third person is not liable.

For instance, a farmer goes into town with wood, and a merchant agrees to pay a certain price. Another merchant offers a cent a pound more and makes a contract which is bound by money paid over, the same as the previous contract had been. A third person raises the bid another cent, and buys it. The third person is not liable to either one of the others, because it is public policy to allow bidding and sale of all kinds of property in the open market free and untrammeled. But you must not confound the liability of the person who breaks his contract with the person who causes him to break it. The farmer in this case is liable to the first and second persons for all damages which the breach of the contract caused.

But if the third person induces one to break his contract by voluntarily interfering, he would be liable.

68 Vt. 319 47 La. An. 214

I cite these two cases to show again the distinction between the common law rule and the civil law rule.

There is another class of cases in which a person may be injured by the torts of another. The relation existing between master and servant is confidential, and there is an implied covenant on the part of the employee that he will do no act whatever during his employment which will injure the employer.

A servant therefore may not make himself a master of the secrets of the business and use such information afterwards to the detriment of his former master. You will understand this does not mean he can not master the business, but he can not master the secrets of the business. For instance if he is employed in the circulation department of a newspaper, a copies a list of the subscribers and goes to a rival company with this list, the court will enjoin him from selling or using that list or any person who purchases it.

Law Rep. 2nd Q. B. 1 Law Rep. 4 Ch. Div. 49
Law Rep. 35 Ch. Div. 449 114 Mich. 149

While a person is in the employ of another, he may not refuse to do anything in the line of his employment when such refusal will work his employer damage. For instance, an engineer in the employment of a railroad may not refuse to haul cars of a particular description.

62 Fed. Rep. 796

The labor unions had some difficulty with the Pullman Mfg.Co. and in order to enforce their demands against the Pullman Mfg.Co. they enlisted the Engineers Union, and the engineers refused to haul Pullman cars. They did not refuse to work for the railroad by refused to draw a train with a Pullman car. So the question came before the court whether an engineer could refuse to work his engine while inthe employ of the company while a Pullman car was attached. The court held he could not.

BOYCOTTS AND OTHER CONSPIRACIES AND COMBINATIONS.

A conspiracy is a combination of two or more persons by concerted action to accomplish an unlawful purpose or a lawful purpose by unlawful means.

148 U.S. 203 158 U.S. 564

67 Federal Rep. 698

The case at 158 U.S. is the celebrated Debs case.

The term boycott takes its name from the agent of an Irish landlord, who making himself offensive, his enemies determined not to have any business with him and to prevent others from having any, and if necessary to use force. And since they resorted to these means to get rid of Mr.Boycott, the unfortunate individual gave his name to that sort of proceeding.

55 Conn. 46

The term strike has been defined as a combination among those employed by others to compel an increase of wages, a change in the hours of labor, or some other change in the manner and mode of conducting business of the principal, or to enforce some particular policy as to the character and number of the men employed, and the like.

26 Oregon 541.

Now you will notice that both the boycott and the strike require the joint action of several persons. And if the strike or boycott is lawful, that is, for the purpose of accomplishing a lawful act and the means used are lawful, no damages can be recovered. But if the strike or boycott is to accomplish an unlawful purpose, or the means resorted to are unlawful, then damages may be recovered.

It is a general principle that every laborer has a

right to fix the value of his services, and the reciprocal right belongs to the employer to determine what wages he will pay. The combination on either side, on the side of capital called a trust, or on the side of labors called a Union, is made necessary at the present time under our civilization, because if the laborers did not combine they would be crushed by the capitalists, and if the capitalists did not combine they would be crushed by competitors. The only question is how these parties who have combined and have a right to combine, may accomplish their purpose in a lawful manner, and the question is surrounded with a great deal of difficulty on both sides.

113 Mass. 179
Law Rep. 21 Ch. Div. 194
Law Rep. 4 App. Cases 674
4 Metcalf 111

The first general proposition is that ~~if~~ the combination of individuals having for its object to compel by force, threats or intimidation, an employer to conduct his business in a particular way, or to compel him to discharge persons he wishes to retain in his employ, is unlawful and such combination will be restrained by injunction.

55 Vt. 46
45 Fed. Rep. 193
77 Md. 396

In this second case the question was between a newspaper and a union which sought to compel the proprietor to employ no one except union printers, and they resorted to force to prevent men from working from him. He brought suit against the union and the courts enjoined them.

In the Maryland case a man had been employed as cutter by a merchant tailor. He did not belong to the Knights of Labor and they made a demand on the proprietor that unless he discharged this cutter they would take every man belonging to their union out of his employment. The employer decided to retain his other men. The cutter brought suit against the Knights of labor and the court held he could recover all the damages he had sustained.

I will cite also 118 Mich. 497
1898 Appeal cases 1

This last case was decided in the House of Lords, and the opinions of the best jurists of England are given pro and con.

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Mch. 1, 1901

LECTURE III.

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In one or two lectures I shall call your attention to the RIGHTS OF PEW HOLDERS AND BURIAL RIGHTS.

The original construction of churches in England was patterned after the Roman court house. There were two rows of columns which divided the main body of the church into three portions. That portion of the body of the church between the columns, the main part, was called the nave of the church, a term that we still use but now the nave means the whole body of the church. That portion of the church between the columns and either side was called the aisle. There were just two aisles, one on each side. The choir and chancel was built on to the rear in circular form. The outer vestibule of the church was called the narthix. In the old churches there was no gallery. After you got into the narthix you were separated from the main body of the church by a kind of partition extending upwards eight or nine feet, and in this there were three or more openings going from the narthix into the main body of the church.

About the middle of the third century the persons who were permitted to enter the church were divided into five classes; and places were assigned to each class. There were no seats or pews.

The first class were the weepers, those persons who were desirous of becoming members of the church, and they were confined to the porch on the outside, and not permitted to enter the church until they had been there a certain length of time, showing that there was a bona fide wish on their part to become members of the church.

The second class were the hearers, and they stood in the narthix or vestibule. They could not see much on account of the screen but they could hear because it was an open screen. The hearers stood next to the open space on the outside.

Between the hearers and the screen was another class, the catechumens, who were receiving instruction. The third class were the prostrates because those who were first permitted to enter the church were compelled to throw themselves prostrate upon the pavement of the church.

The next class were those standing. After they had been prostrate for a certain length of time they were permitted to stand up further in the church, and these could remain after the other classes had retired.

The 5th and last class were the communicants, the persons who had been admitted to communion.

This division of the members of the church and those desiring to belong to the church is of no practical value perhaps to the lawyer except to show the growth and development of the church and church membership. At first no part of the church was set apart to any particular persons, but as we have seen, particular classes were entitled to standing or kneeling room who had been admitted to the church as communicants.

This continued up till the 12th or 13th century, at which time the custom was introduced in England for the patron of the church to reserve for himself and family a portion of the aisle. The origin of pews was this custom of the patron of the church. The portions of the aisles set aside for pews were enclosed, in some places by partitions five or six feet high, and fitted with windows to enable the occupants to see the minister and a portion of the congregation.

The next step in the evolution of the pew was for the Bishop, who was the ordinary, to assign pews to certain persons, benefactors of the church, and this privilege which he granted was called a faculty, and gave the grantee the right to use this pew.

In the absence of the bishop, the church wardens exercised this power. The wardens in the early history of England occupied a very prominent position. They were the chief men in the parish, and the parish government for several centuries has been important in the interior of England. The Protestant Church in this country has still retained the name of warden, but they have no such powers as the wardens had four or five centuries ago. They had civil rights because the church at that time was connected with the state. Here it is a mere private corporation.

These faculties were given in connection with some house or lands within the parish, so that the occupant of the house or lands had a right to the pew as appurtenant to the property. It was not a right which belonged to an individual as an individual, but as the owner of the property.

In the 16th century the custom became general of pewing the entire church, both aisles and nave, and certainly during that century it was not uncommon to have the pews furnished with locks. The custom was quite universal when the first emigrants came to America, and the first churches built by the Puritans in New England and the Cavaliers in Virginia were supplied with pews and the pews were furnished with locks. These

pews were at first square to accomodate a family, and such pews were common in this state fifty years ago. A portion of the family sat with their backs to the minister. The minister was ten feet above and the people in the pew could see him but not their neighbors.

Those of you that desire to get descriptions of the old pews I refer you to the Church Encyclopedia, Title Pews; Heales History and Law of Church Pews; Hooker's Church Dictionary, title Pews

In England no one not a member of the church could hold a pew The church was for the benefit of the parish; so that if a member had an interest in a pew a left the parish, he abandoned his right in the church

17 Upper Canada C.P. 88

An easement in a pew might be acquired by prescription, but the easement must be appurtenant to some house.

3 Adams 1

At the common law the freehold of the parish church ground was in the parson, and all of the inhabitants of the parish had the right to use the church for divine worship.

There was at first no right recognized to sell or let a pew or seat

Law Reports 5 C.P. 224

All of the pews were the common property of the parish and were first held for the use of the parishoners in common and the parishoners were entitled to be seated so as best to provide for the accommodation of all.

The wardens had the right to determine where a person should have a seat It was the duty of the church warden to accommodate all the inhabitants, but all were not entitled to equal accommodations The Eclesiastical law did not recognize any equality between the rich and the poor.

The owner of a pew was never regarded as a freeholder He was the owner of the pew in the sense that he could occupy it, and if he died it went to his family. This of course in England was important for the reason that certain privileges are given to freeholders In this state it is only freeholders that can sit on a jury. In England no one can voto unless he is a freeholder or has a certain income

Law Rep. 2nd C.P. 104
Law Rep. 5 C.P. 224-35

In England the interest in the pew is a mere easement, a right to occupy it for a particular purpose at stated times, not different in that regard from any other true easement

The prevailing doctrine in this country is that property rights in a church edifice are the same as those in any other building, for the reason that there is no connection in this country between church and state, and we look upon a church organization as any other private corporation

1 Greeleaf on Real Property 44
18 Vt. 29
16 Wendell 29
15 Vt. 119

Same case, 40 Am. Dec. 366

Titles in this country to pews depend upon statute law and not upon the canon of the church. No canon of the church can affect the civil rights of the citizen. Of course if such canons are made a part of the contract, they do not affect his right, but they affect the contract which he has made.

30 Vt. 593

Same case, 80 Am. Dec 653

Since in this country the title to church property is governed wholly by common and statute law, it follows that a church corporation can create and transfer any estate in land or buildings which they own, the same as any other corporation.

If A is the owner in fee of lands and a building situated thereon, he can grant to B either the house or a leasehold estate in a room or any part of the house. Similarly, the owner of a theater could convey the fee of any seat in the theater, and such fee could be conveyed unconditionally, in which case the purchaser could occupy it without charge; or such seat could be granted with the condition that the purchaser should pay whenevor he occupied it the regular rates.

The various religious corporations in this country have practically adopted one of three different plans of disposing of church property in pews: 1st, selling the pews outright; 2nd, renting the pews for a specified period; 3rd, depending upon voluntary subscriptions and having free pews.

Now in these lectures we have nothing to do with the renting of pews or free pews, but will confine our attention simply to the first system of selling the pews in fee simple. In this case the owner may be taxed as a pew holder

[illegible] [illegible] [illegible] [

but this may be dependent on whether the pew is sold outright in fee simple or sold conditioned that the holder would pay such assessments as the officers of the church make.

I am inclined to think this system is going out of vogue, but it is likely to be revived at any time. Fifty years ago it was common throughout the country. What I call your attention to is that they can be sold in two different ways; 1st, they can be sold absolutely so that the purchaser has no further duties to perform; or 2nd, the pew may be sold and the purchaser simply has the preference to occupy it, but is obliged under the terms of the sale to pay any assessment made upon the public for the support of the church.

Now while the title in the owner of the pew is a title to real property, the title is peculiar In the first place, it is confined to the pew He is not the owner of any part of the ground on which the church edifice stands; and he does not own the space above. His title is also subject to the right of the corporation owning the building to make necessary and reasonable changes in the interior of the church; and if such reasonable changes necessitate the destruction of the pew, he can not complain if he is given equitable compensation for his loss.

17 Mass 435
Same case, 9 Am.Dec 159
109 Mass. 1

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March 8, 1901

L E C T U R E IV.

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At the close of the last lecture I called your attention to the fact that when the officers of the church found it necessary to destroy one of the pews owned by a member, just compensation must be made for such destruction. They could take the pews if it was necessary for the good of the church, but the value of the pew must be given to the pew holder.

The compensation which the pew holder is entitled to for the loss of his pew is measured by its value at the time of its destruction. If the church edifice has so far fallen into decay, or for any other reason can no longer be used as a church edifice, the pew holder is not entitled to compensation since he has suffered no damage.

7 Pickering 138 24 Pickering 347
47 Vt. 262 160 Mass. 118

You will find in this last case a very full discussion of this question. It involved the whole question whether a church has a right to build a new house of worship and destroy the pews in the old house that have been purchased and paid for. The Massachussetts Supreme Court held that if the church by reason of decay or other injury could not be used as a church any longer, the pew holder would not be entitled to compensation; but when the congregation had outgrown the capacity of the church, the corporation obtained no right to destroy the pew without first compensating the owner.

The fact, as we have said, that a person is the owner of a pew does not relieve him from paying assessments made upon such pew, unless his deed relieves him from such assessment. The power of the proper officers of the corporation to make assessments upon pews for the support of the church depends almost entirely upon the statutes of the several states and upon the canon law of the churches themselves. You will find when you come to examine the statutes that certain powers are conferred upon religious corporations in regard to building churches and in regard to the support of churches. Then in addition to that these various religious organizations have authority to pass laws regulating the conduct of members, and the authority of members to assess pews for the support of the church. 80 Me. 27 7 R.I. 69
10 Johnson 217

PART IV.

---oOo---

When a condition is annexed to the sale of a pew in fee, such condition is not void. As you understand, if a man sells land in fee to another and puts in the deed a condition that he shall not sell, that condition is void, because it is repugnant to the grant. Then there is another rule against perpetuities, which is, that the right of alienation shall not be suspended for a longer period than lives in being and twenty-one years thereafter. These rules do not apply to pews.

3 Gray 1 106 Mass. 479

This case in the 106 Mass. arose in regard to the Old South Church in Boston. Every pew in the church was sold, and the arrangement was that the purchaser should not sell the pews, but when he was ready to vacate the pew he should offer it to the trustees of the church for the price which he paid for it. One of the pew holders found he could make more by renting the pew than by selling it back to the church. When the officers of the church ascertained that he had rented it they took possession of it, and then he brought suit, and the court held that the condition in the contract was good, and since he had violated that condition, the trustees had a right to take possession of the pew.

The Non-Conformist Church in England, which is any Church outside of the Protestant Episcopal Church, and all the churches in America are regarded as private societies, having full power and jurisdiction to condemn or reject members and determine all questions touching doctrine and practice, and the findings of their courts and tribunals in this regard are conclusive and final and there can be no appeal to the civil courts. In other words, the State has nothing to do with these private organizations, and they stand upon the same footing as the Masons, Odd Fellows, or other organizations of a social nature.

4 Moore P.C.C. 250 3 Moore 115

If the rules and canons of such a body are not against public policy, the courts of law will not interfere in the enforcement of such rules, on the application of any person who has chosen deliberately and voluntarily to enter such a body and subject himself to the same, provided that the result of the proceedings is merely to deprive such person of membership or a mere right to meet and associate with the other members. In short, if it affects merely his social relation and does not touch any property rights, the courts will not interfere.

Therefore, if a man owns a pew in a church, the church can not deprive him of his interest in that pew by expelling him from the church. They can expel him from the church and refuse

The Non-Conformist Church in Egypt, which has
Church and the Presbyterian
possession of the

to commune with him, but they can not prevent him from sitting in the pew. So if a person has property rights in a Masonic fraternity, or other organization of like character, they can not deprive him of those rights, and he can appeal to the courts if they seek to do so.

I cite you upon this proposition two Scottish cases:

22 Court of Sessions 290 23 Court of Sessions 314

The state regards the constitutions, canons and by-laws of a church in the light of a contract; that is, a contract between the corporation and the members. So long as the terms of the contract are carried out no one can complain. If under the canons, some person is dismissed, no one can complain because such is the contract.

23 Court of Sessions 1314-30

In other words, when a man joins a church, he is supposed to know the doctrine of the church and how he must conduct himself in order to remain a member of the church; and these canons are a contract between the church as an organization and the individual. If that contract is violated, the canons of the church provide how he shall be tried, and if the tribunal finds that he has violated the doctrines of the church, and is not permitted to enjoy membership in the church, the state has nothing to say. If the sentence is within the contract; that is, if the church has proceeded according to the canons of the church, the courts will not interfere.

23 Court of Sessions 1332-34

If, however, such a member is the owner of a pew, and his title to property is dependent under his deed upon his remaining a member of the church, he may apply to the courts if the corporation is proceeding in an irregular manner to expel him, and the corporation will be compelled to proceed in a regular and legal manner. His property rights will be protected. Of course if they proceed in a regular manner and he is expelled, that is the end of it. These same principles apply to any other corporation.

103 Mich. 437.

This was a case in which the rights of the Macabee organization to expel a person was before the court.

THE next subject to which I shall call your attention is BURIAL RIGHTS.

There is some confusion in the law in this country regarding this subject.

1. Who has the right to determine in the first instance where the body of the deceased shall be buried?

2. Who has the right of action in case a corpse is disturbed?

I am not speaking of course of the right of action of the state, because it is a criminal offense to disturb a grave; but of the cases where a private person desires to bring action where none is brought by the state. Where a man dies and the only relatives are two brothers, for instance, one belonging to the Catholic Church and the other to the Protestant Church, who is to determine where he shall be buried? Fortunately, these conditions very seldom arise, but what I shall call attention to is the uncertainty of the law in regard to this subject.

This confusion in this country arose in part from the fact that the Ecclesiastical courts in England had exclusive jurisdiction of burials, and the jurisdiction of the common law courts was confined to the right of the heir in the monuments, etc. erected in honor of the dead, they being regarded as heirlooms; and in this country all the jurisdiction is conferred upon the law courts. The church and state have from the first been united in England, and the chief dignitaries of the church have by virtue of their office been also prominent in secular affairs.

About the year 700, the Saxons, who were then Christianized after a fashion, founded churches for themselves and their households in all the large districts of England. These were the original parish churches of England. Afterwards as population increased several churches were established in the same districts; and in many instances they obtained the rights of tithes, burial and baptismal rights, and became likewise parish churches.

Comens Digest, Esglise, under "Church".

A space thirty paces in width around the parish church was the church cemetery, and that space extended entirely around the church. While the right of sanctuary continued in England this space was considered a sanctuary, and any one having committed an offense, could if he got within thirty paces of the church, be free from arrest. The ground upon which the church stood was also used for burying the distinguished dead, and the walls of the church were used to commemorate their virtues and valor.

"H[illegible]ject to which [illegible]ll your attention
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There is more confusion in the [illegible]ntry
[illegible]rning this subject.

1. Who has the right to determine in the [illegible] instance
where the body of the deceased shall be buried?

2. What is the right of action if one's [illegible] is disturbed?

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This question is [illegible] country where [illegible]
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were the right [illegible] churches of England. After [illegible] a
population increased [illegible] several churches were established in the
same district; and in many instances they obtained the right
of tithes, until [illegible] baptismal rights, and became likewise
parish churches.

Corpus Dicest, Topline, under "Burial".

A space [illegible] three to eight around the parish church
was the cemetery, and that space extended [illegible] church
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citizen, be free from arrest. The ground upon which the church
stood was also used for burying the distinguished dead, and the
walls of the church were used to commemorate the virtues
[illegible]

The title to the church and church yard was in the parson as a rule, especially in the country. In the cities it might be in the church warden.

Comens Digest, Cemetery, A-2 A-3

At first the church was used for many purposes other than holding religious meetings. It was often used for a store-house and for purposes for which town halls at the present time are erected. The pilgrim fathers brought over these customs and with the t the church was called a "meeting house".

This promiscous use of the church in those turbulent times led to manifest abuse in England, and early in the 17th century, 1603, a canon was passed prohibiting the church wardens from permitting feasts, plays, banquets, and other profane usages to be held in the church or church yard. Long prior to that time a state was passed, 13 Edw.I, prohibiting fairs to be held in the church yards, and in 5 Edw. VI severe penalties were enacted punishing persons who should engage in a brawl or fight with weapons in a church or church yard.

Comens Digest, A-3.

By the custom of England every person dying in a parish who was entitled to Christian burial was entitled to be buried in the church yard or chancel, upon the usual fees being paid to the parson. A suicide was to be buried at the cross-roads and a stake driven through his body, and there were certain other persons who had been excommunicated or had committed offenses, who were not permitted Christian burial. In the country one hundred years ago the usual fee for burial in the church yard was 3 s. 4 D. and for burial in the chancel 6 s. 8 d.

Comens Digest, Cemetery B.

The church yard , or cemetery, was regarded as belonging to the church and was consecrated, a custim still preserved by the Roman Catholic Church in this country.

After the Norman Conquest the Eclesiastical Courts had exclusive jurisdiction over the burial of the dead, and the church had exclusive executive authority touvhing the cemetery.

4 Bradford 503, Appendix

I call especial attention to the appendix of this case, which contains a full discussion of questions arising in regard to a removal of some of the dead buried underneath an old church in New York City.

See also 3 Fillimore 355; 2 Barnwell & Al. 806

This case arose out of grave robberies in England, and contains a full discussion of the right of burial, the interest of the church in the church yard, and the interest of the relatives of the dead in the grave. It holds that the right to use the church yard belongs to each generation.

---oOo---- March 15, 1901

March 15, 1901.

LECTURE V.

---oOo----

I called your attention in the last lecture to the fact that under the common law system the common law courts had jurisdiction so far as property rights were concerned and the eclesiastical courts so far as burial rights were concerned. The cleavage line between the jurisdiction of the eclesiastical courts and the commonlaw courts separated the burial pure and simple from the habiliments of the grave. The church determined who were entitled to burial and in what manner they should be buried; the law courts protected the heir in his property rights, both in the tombstone and even in the grave clothes.

4 Bradford (N.Y.) 503. especially the appendix to that case.

In this country the law and equity courts have the jurisdiction which formerly applied to the eclesiastical courts and the common law courts; and they determine the right of burial, how the parties shall be buried, and the property interests connected with the burial.

The statute inmost of the states makes the expenses of burial a proper charge against the estate of the deceased, and it is the duty of the executor or administrator to defray such expense, which is made the first lien upon the estate of the deceased.

2nd Queens Bench 246

Each student must examine the statutes of his own state to ascertain what the regulations are in regard to defraying the expenses of funerals.

In the case cited, 2nd Queens Bench, a man died while in prison. The executor demanded the body for burial and was refused on the ground that certain sums were due from the deceased to the jailor, who proceeded to bury the body in the jail yard, and held the body as a pledge for the debts which the deceased had contracted in the jail. The executor applied to the courts for a mandamus to the jailor to deliver the body and that writ was granted and afterwards the jailor was prosecuted and fined.

The person in whose house mother dies may be compelled at common law to bury the body, because not burying the body would create a public nuisance.

12 Alderson & Ellis 773
58 Howard's Pr. 55
98 Mass. 538

WHO HAS THE RIGHT TO BURY THE DEAD?

A person himself may direct in his lifetime where he shallbe buried and the manner of his burial, and if such directions are not contrary to public policy and are reasonable they will as far as possible be carried out. This request may be made in writing in ones will, or it may be made orally during ones last sickness or even long before his last sickness,while he is in health.

93 Iowa 228

same case, 35 Lawyers Rep. An. 56

In this case, especially the latter, you will find a large number of cases cited in proof upon this subject of the right of a person in his life time to determine where and how he shall be buried.

I also will cite 123 Calif. 285

In this case the deceased died testate,having left a will disposing of his property. He was a native of Ireland and died in California. He made no provision in his will for his burial, but during his last sickness he expressed a wish that the body should be taken back to Ireland and buried there, and so when the estate came to be settled the widow petitioned the probate court setting up the facts in the case, and asking the court to appropriate a sufficient sum. The court made an order giving $700. to the widow for the purpose of removing the body to Ireland and buryying it there.

The widow or husband first, and secondly the heir at law has the right to determine where the body should be burxied.

93 Iowa 228

You will find that the decisions of the courts are uniform upon the question that after burial, if the burial has been made with the consent of the party who had a right to determine xwhere it should be buried, the body must rest forever where it was buried,and the parties can not change their minds and afterwards insist that the body shall be removed.

The courts also hold in the above case that all persons in interest should have the right to visit the grave at all suitable times and make any suitable decoration.

While a person may direct where his body shall be buried and his direction in that regard will be enforced,he may not otherwise dispose of his body by will.

There seems to be a tendency inmodern times for persons to give or sell their bodies for certain purposes, and this rule

of course becomes important.

Law Reports 20 Ch. Div. 659
same case, 21 Amer. Law. Rep. 508
10 R.I. 227

The attitude of the courts upon this subject is that since rites of burial have been recognized for 2000 years and by many races for a much longer period, no individual has a right to violate that instinctive feeling which is recognized as applying to the whole race to bury their dead; and consequently if he desires to make any other disposition of his body it is a desire which the courts will not enforce. He has a right to have his body disposed of as the bodies of his fathers have been disposed of for centuries, but he has not the right to break in upon the custom; so that he may not turn his body over to a hospital for instance for the benefit of science and he may not order his body burned. Now of course this rule is not a rule that may not be changed, because the custom is growing in this country to burn the body instead of burying it, and it is possible that we shall in time return to the Roman custom of burning the body, having the ashes preserved in anurn and the urn one of the ornaments of the parlor.

It is the general rule as I have given you that the husband or wife may determine where the dead shall be buried; but there may be circumstances in a given case in which the courts will say that that right does not belong to the husband or wife in the first instance, but belongs to the children.

18 R.I. 155 130 Miss. 423
60 Howard 368 47 Minn. 307
14 Lawyers Rep. An. 85

In the 60 Howard, a man was married a second time but had no children by the second marriage. He died four years after his second marriage and a dispute arose as to the right to bury the body between his second wife and the children of the first wife, and the courts in that case gave the right to the children and not to the widow. If she had been the mother of the children there is no question but that her desires would have been respected.

When the body has once been buried with the consent of the person having the right to designate where ~~xhxx~~ such body shall be buried, no one has the right to remove it without the

consent of the proper authorities, judicial or municipal. This proposition goes just one step further than the one I gave you that where the parties consent to the burial the body must remain. This proposition is that the parties themselves who have consented to the burial, if they agree that the body shall be removed, they have no right to remove it until they have applied to the proper authorities and obtained permission to remove it. After the body has once been placed in the tomb it is in charge of the public, and the public authorities must be consulted if a second burial is desired. This is merely a police regulation to protect the public health.

130 Mass. 423
42 Pa. St. 293
same case, 82 Am. Dec. 506
10 R.I. 227
same case, 14 Am. Rep. 667

The 42 Pa. St. is a case where an officer who had served in the Mexican war was buried and the question arose whether his widow had consented to the burial or whether under the circumstances she was not in a physical condition to give her consent, and consequently whether when she had obtained permission of the public authorities, she had the right to remove the body; and the court in that case held that she could remove the body.

The right of burial in a particular parcel of a church yard, although given by deed to a person and his heirs does not convey the absolute fee. It is rather in the nature of an easement; that is, that one has a right to use it as a burial ground. It gives the right of burial in such particular parcel of ground so long as the church yard shall be used for burial purposes and no longer;and consequently if the authorities decide to vacate a cemetery,the bodies that have beenburied there being removed to other burial grounds, the owner of the lot in such burial ground can not object.

22 Barber 42
88 Pa. St. 42
32 Am.Rp. 417.

Although a man may have a deed to a lot in a cemetery, if he permits a third person to bury his dead in that same lot, the person who thus buries his dead in the lot has an interest in the tombstone, and he has almost the same interest as he would if he owned the lot itself. This is a condition of ownership which does not appear in any other property.

The interest in the tombstone and other property rights in the grave go to the person who is thus permitted to bury his dead in the lot, although he may not be the owner of the ground. If a person commits a trespass he can bring a proper action for punishment.

4 N.H. 415 20 R.I. 646

This case in the 20 R.I. contains a very lucid discussion of this subject. They point out these burial rights and interests which the owner of a tomb has in the tomb although he is not the owner of the ground; and they point out that you may not levy an execution upon a persons interest in a cemetery and sell it. They point out that you may not mortgage it. A man may have a lot in a cemetery and if so he has a right of course to sell it.

PROPERTY RIGHTS IN A DEAD BODY.

While the early English decisions hold that there can be no property rights in a dead body, the trend of modern decisions is to the effect that there is such a quasi property interest as will give the next of kin, including in that term the husband or widow, the right of custody before burial, and the right to maintain a proper action to preserve the body from removal after burial.

The decisions are uniform that so far as a dead body is concerned there was no property rights in it. I suppose that the law courts held that there were no property rights in a dead body because they did not wish to come in conflict at all with the eclesiastical courts. The eclesiastical courts determined whether the person was entitled to Christian burial and having determined that they determined how he should be buried. The law courts came in and the question was where their jurisdiction should commence and how far it extended. If it went to the body itself it would interfere with the eclesiastical courts in determining where it should be buried, because of course a person who has the right to determine how it should be buried has the right of custody of the body. But if there was a property interest in the body then the commonlaw courts could obtain the custody of the body, and you would have a conflict between the two rights. So the common law courts for the purpose of giving the eclesiastical courts exclusive jurisdiction perhaps stated that there were no property rights in the body at all. There were property rights in the coffin, in the tomb, and everything except the body itself. But although there is no property right in it there is the right of custody so that the body may be buried and there is a right

to maintain i violate the grave so that if any one interferes with it they may be punished.

130 Mass. 423
13 Ind. 134
47 Minn. 307

It is a misdemeanor at common law to remove a body after burial without authority. Although there was no property right in the body itself so that a person could not be arrested for larceny if he took the body, yet he was guilt of a crime if he interfered with the last resting place of the dead. It was a felony to steal the shroud or apparel, and taking out dead bodies for the purpose of dissection is an indictable offense. So that under the common law this peculiar state of affairs existed: If a man opened a grave and stole the body, leaving all the grave clothes in the grave he was guilty of a misdemeanor only, because he had simply disturbed the grave; but if in removing the body he took the shroud he was guilty of a felony because he had stolen something that was of value.

8 Abbott's New Series 159
7 Cox C.C. 214
2nd Term Rep. 733
58 Cal. 226
58 S.W. Rep. 213

This last is a Tennessee case. There is no statute in Tennessee in regard to the removal of a body or in regard to the sale of a dead body, so that the common law rule applies. In this case the poor authorities turned over a body to be buried by the proper person. That person made arrangements with another to sell the body to a hospital, and so instead of burying the body he buried the coffin. The case went to the Supreme Court to determine whether he had committed an offense in selling the body. It was held that while there is no value in the property at all, that the right of burial is a sacred right, and that any one that interferes with it by selling the body has at the common law committed a high misdemeanor.

Because there is no property right in the body it can not be replevied, nor can it be replevied under pretext of replevying the coffin.

1 Mo. App. 136

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March 22, 1901

LECTURE VI.

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You will gather from what I have said that there is no question but that near relatives have a right to the custody of the body of the deceased, so as to prepare the body for burial. The only question is, since there is no property right in the dead body itself, how that right of custody can be enforced if it is interfered with. If the body is in the possession of a third person who refuses to deliver it to the party who is entitled to the possession in order to bury it, can he obtain such possession and how shall he proceed?

First I call your attention to a decision of the Supreme Court of Michigan found in the 5th Detroit Legal News 918; and 119 Mich. 550.

This was an action brought by a party who was entitled to the custody of a dead body for the purpose of burial against certain undertakers who refused to deliver up the body. The body had been turned over to the undertakers by the coroner, and they refused to deliver up the body unless the expenses were paid. The party brought replevin to obtain possession of the body, and the Supreme Court of this state held that that action could not be maintained for the reason that no action of replevin can be maintained for the possession of property that has no value.

How how far the court would go in holding that you could not bring replevin for some heirloom that was absolutely worthless in the market, though of some value of course to the owner, I am unable to say. It seems to me that the Supreme Court of this state was a little clinical when they held that a person could not maintain an action of replevin for a dead body which he was entitled to the possession of in order to bury it, because forsooth it had no market value. But that is the law of this state, and in this decision they comment on other cases, and I will give you those cases:

Law Reports 20 Chanc. Div. 659
1 Mo. Appeals 141
99 Mass. 284
37 N.Y. Superior Ct. 471
2 Queens Bench 246

Now if there is no property right in a dead body of course a person can not suffer in his pocket for any injury done to,the dead body; so that if the body after death is mutilated, he can not recover any damages for the mutilation so far as the property rights in the body are concerned.

But notwithstanding that fact, this right of custody carries with it the right to recover in the nature of damages for any injury to the body;but the damages which are recovered are damages for injury to the feelings of the person entitled to the custody of the body.

Griffith v. Railroad 24 S.W. Rep.
21 Amer. Law Register 586
6 Amer. Law Review 182
47 Minn. 307

In this first case the action was not sustained because it was brought by the administrator to recover from the Railroad Company for negligently causing the trains to pass over the dead body. It was held that so far as the administrator was concerned he was not so connected with the dead body that he could recover for the mutilation.

In the 6 Amer. Law Review, the body of a woman was turned over to a colleage at the request of the physician who desired to examine the throat to ascertain the cause of the disease. For some reason they concluded to retain the body, so they buried a coffin filled with wood. But afterwards it came to the knowledge of the husband that the body was not buried and he brought action,and the court gave him damages and compelled the physician to bury the body.

The right to recover damages for the unlawful interference with a persons right of possession to bury a dead body depends not upon a strict property right in the body itself, but upon the fact that the important right to have and maintain the custody of the body in the condition it was at the time of the death has been invaded and if such invasion has caused mental suffering, such suffering is to be regarded as an element of such damages. And indeed it is the only element of damages, because since the body has no value, any injury to the body can inflict no injury upon the person entitled to the custody.

1 Appeal Div. (N.Y.) 551
169 Mass. 57
47 Minn. 307

In the 169 Mass. a father maintained an action against the officers of a hospital for permitting an autopsy upon the body of his child and recovered damages.

The State has a right under certain circumstances to order a post mortem examination of a dead body; and incase the coroner does not act wantonly, and the dissection is properly made so as not to disfigure the body unnecessarily, neither the coroner nor the physician is liable. It is in the interest of the public that the dead body should under certain circumstances be examined by physicians in a post mortem examination, incase they think the death is caused by some foul means.

32 Atlantic Reporter 177
81 Md. 358

In this case a man had his leg crushed upon a railroad. The hospital performed an amputation but the person died within a few hours, and they held a post mortem examination. There was not much doubt as to what caused the death; it was either the accident on the railroad or the amputation of the leg. But the court held that under the circumstances in that case they were justified, and the widow could not maintain an action.

In closing this subject of burial rights I submit to you a problem, which will enable you to apply the principles I have given you.

A is the owner of a vault in cemetery X, which has been in possession of A's family for several generations and has been used during all that time for burial purposes. B, a stranger, entered said vault and removed therefrom the skull of A's grandfather and now has the skull in his possession.

Can A compel B to restore the skull, and if so, by what action. Secondly, can he recover any damages from B, and if so, what damages?

In connection with this same subject, it may perhaps be of interest to the class to call attention to the old right of sanctuary, not so much because it has very much to do with modern law upon this subject, but because it is intimately connected with English history and all history down to a few centuries ago. Of course I am only calling your attention to the sanctuary under the common law, not the sanctuary under the Jewish law.

From very early times in England, at least as early as the 7th century, the church was used as sanctuary for criminales fleeing from officers of the law. William, the Conqueror, ordained that whoever took a person who had sought a sanctuary or an abbey should be fined 100 shillings; if the person was taken from a parish church 30 s; if from the church yard 10 s.

In one village the sanctuary covered the whole village and a portion of the country surrounding. Four stone crosses were set up in each of the highways leading to the church in that village, and each of the crosses had the word sanctuarium, and it marked the boundary of the sanctuary. So that if the person succeeded in getting beyond this cross he was within the sanctury. If a refugee was captured inside the cross the officer was fined 16 pounds; if within the town, 32 pounds; if within the church yard 48 pounds; if within the nave of the church 96 pounds, if within the choir 144 pounds; and if the refugee had reached the holy relics near the alter, the officer was excommunicated.

The culprit seeking the aid and support of the church was furnished with food and shelter. Men were stationed at the door of the church at all hours to receive refugees, and as soon as a fugitive was admitted the bell was wrung notifying every one within hearing that a fugitive had sought the sanctuary of the church.

A record was kept of these fugitives. If the fugitive would not come to terms with those he had injured within forty days he was at one time required to abjure the kingdom.

The sanctuary was abolished in England by statute in the time of James I.

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March 29, 1901

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LECTURE VII.

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THE RIGHT OF PRIVACY. You understand of course that the court have to do with property rights primarily and not with moral obligations, and upon this subject I call your attention to what extent the court will go to protect a persons right to privacy, how far you can compel by legal process another to mind his own business and not to intermeddle with your private matters. This is a question not readily or easily answered.

When an actual damage canbe shown to property, relief will be given. The difficulty arises when the action complained of may not make a person any poorer measured in dollars and cents, but simply make him unhappy and miserable by injuring his feelings.

The law of slander is a familiar illustration. A accuses B of a felony but not in the presence of a third person, and since there is no third person present there is no publication, and there being no publication there is no slander. B so far as his feelings are concerned has been injured. The law, however, gives him no remedy. His character has not been injured; he has been deprived of no right and he has suffered no legal wrong.

Not only does the law not recognize any injury under the circumstances we have supposed, but if he takes the law into his own hands and personally chastises the man who has accused him of a felony, and he is arrested for assault and battery, the courts will convict him on the ground that mere words do not justify a resort to physical violence. In most of thise cases, however, the jury comes to the assistance of the person who has committed the assault and battery under those circumstances, and finds he is not guilty.

When the act complained of interferes with a person's property rights, or constitutes a breach of contract or trust, the courts willinterfere.

First I call your attention to PROPERTY RIGHTS IN PRODUCTIONS OF A LITERARY CHARACTER.

A person at the common law is absolute owner of the products of his brain. If he writes a book, a poem or a play, it may not be published without his consent. If published, however, by him and given to the public, it then at the common law becomes public property.

4 Burrows 2508

The publication here referred to is not communicating the contents of the book, the play or poem to one or a number of

persons, to as many indeed as will listen to the reading of the book or the recital of the poem. A man may write a play and it may be produced on the stage, but productionon the stage is not a publication which will authorize it being printed and distributed, and the reason for that is that the purpose of the play was to produce it for the public,and it would be useless so far as property right is concerned unless the party put in on the stage. So a poem may be written for the purpose of recitation to an audience. Wendell Phillips, for instance, wrote lectures that he delivered year after year, but no one had a right to public the lecture.

2 Swanston 402
2 Sweeley 530
same case, 9 American Law Register 33

The courts hold that what a man produces of a literary character has some value and ~~x~~ is his property;and they hold further that the right to publish is an incident to this right of property, but still so far severed and apart from the property right itself that the author may part with his property in the manuscript,~~itself~~ and retain the property right in the letter, poem or book. This is an important distinction. A man writes a poem. He may part with the paper upon which the poem is written and the party to whom he gives the paper would have an absolute title to it; but the person in giving the manuscript does not part with his property right in the poem as a poem, and the person who has received the manuscript has no right to publish it.

2 Eden329
Amblers Reports 737.

In this last case a bill was filed by the executor of Lord Chesterfield for the purpose of enjoining the widow of Chesterfield's son from publishin certain letters and character sketches, the manuscripts of which had been given to the widow by Lord Chesterfield during his life time;and the court held that the giving of these letters to the ~~x~~ widow did not transfer the title which Lord Chesterfield had in those letters to the widow, and consequently that they could not be published without Lord Chesterfield's consent.

This is the true reason in our judgment why the receiver of a private letter may not publish such letter. You frequently have it placed upon the ground of breach of confidence, of a sort of trust relationship between the writer of the letter and the person who receives the letter; but so far as the courts are concerned they place it on the ground that the letter as a letter

2 Swanston 402

outside of the mere writing, that is, the conception of property in the composition itself, belongs to the writer of it, and whoever publishes it without his consent violates his property right in the composition.

The letter as such is the property of the person to whom it was addressed; that is the copy of the letter and the paper on which it is written; but he may not publish it because the right to publish it in the first instance belong to the writer and still belongs to him unless he has parted with that right. Whether such letters are written with a view to publication is of no consequence.

4 Burrows 2330

In this case a publisher was restrained from printing a lawyers notes upon cases which he had heard in court.

There are a few cases in the books in which the courts intimate that if private letters are of no value as literary productions, their publication can not be restrained by injunction. The old idea that there are no rights which can be protected in courts except property rights here comes to the surface; and so they intimate that if a man writes a letter which is utterly worthless as a literary production, he may not have the publication restrained, while the fact may be that because it is worthless is the reason he desires to have the publication restrained.

The trouble with this reasoning is that it makes the court act as a literary critic, inasmuch as his decision must turn upon the question whether or not in his judgment the letter if published will sell or perhaps ought to sell.

3 Barbers Chancery
3 Edwards Chancery 515

The better rule seems to be that the intrinsic value of the production is not to be considered by the court.

2 Atkins 342
2 Swanston 402

Books, letters and all works of art belong to the writer or artist, and any interference with the author's right to publish will be restrained.

1 McNaughton & Gordon 25

This was a case in which Prince Albert brought suit to restrain the exhibition of copies of etchings made by himself and Queen Victoria. The first question presented to the court was whether the Prince and Queen in giving away some of these copies to their friends had really published them. It was held that this was not a publication in the eye of the law. The second question was whether the catalogue of the etchings could be re-

strained, and the court held in this case that the publication of the catalogue could be restrained, and the court further ordered all the copies that had been published to be delivered up. This is one of the leading cases upon this subject.

How far the courts will interfere when a person's privacy is invaded and no property interests have been affected, is still an open question. The Michigan courts in one case have gone to the extent of allowing damages for outraging the feelings of another where the apartments were unlawfully invaded.

46 Mich. 160

In this case a physician took with him a man, not a physician, to attend a case of confinement. The physician acted in good faith, but did not let the woman or her husband know that the man who accompanied him was not a physician. The lady afterwards brought suit against the doctor and the person who accompanied him.

Now a property right was invaded, and I call your attention to this because it was not purely a question of the feelings being outraged. No one has a right to enter a man's dwelling house without being invited actually or inferentially, and a man who was not a physician under those circumstances was presumably not invited, and in entering the house without permission he invaded the property rights of those persons and they were allowed exemplary damages. I call attention particularly to the basis upon which this decision was rendered, because I shall call your attention to other decisions in Michigan courts in which they have held that unless there is a property right invaded there can be no recovery.

The dividing line which separates libel from caricature is somewhat difficult to trace, except in this general way: you may not charge a man falsely with a felony, and it does not matter how the charge is made, whether by word, by picture, or by both combined. Neither may you do anything to make a person rediculous and to cause him obloquy. If a caracature comes short of charging a man with a felony or with making him rediculous, it is not actionable.

Suppose, however, the likeness is a good likeness and not a caricature. Will the courts restrain its publication.? The courts will not permit a photographer who has obtained a negative of a person sitting and paying for a number of pictures, to make and sell impressions from the plate which he has used.

40 Chancery Division 345

This was a case where there was no question about the photograph being a true likeness. A lady had photographs taken of herself and her children, and the photographer struck off photographs from one of the plates and made of it a holiday souvenir which was exhibited in his show window. The court restrained the photographer from selling the pictures, but the decision was based on the fact that the picture was taken under a contract, and that since the negative was made under a contract with her to furnish her certain pictures, she had such a property right in the negative that the photographer could not use it for striking off other copies and selling them as his own.

Suppose now instead of her going to the photographer he had taken a snap shot and it was precisely the same kind of a picture he had taken. In such a case the court intimated that no contract relationship would exist and the court could not interfere. What I call your attention to is that so far as the lady herself was concerned she had no property right that she was desiring to protect. She did not care about the negative, but she did care about the sale of the pictures; and it did not matter to her whether the pictures were taken from that negative or taken from a snap shot. Now it seems to me rediculous that the court will protect a lady's feelings in one case and not in the other, when the whole purpose and object of the suit of course is to protect the feelings and not protect the property rights. But that is the law.

The courts make a distinction between a private and public character. If a person becomes a public character, by occupying a position in the public service, or by advocating public measures, or by addressing the public as a writer or artist, he can not ask to be protected in a privacy that is inconsistent with his public career. Of course he has the same rights of privacy in his home as he would have as a private character.

But suppose a man becomes notorious through some misfortune, so that the public becomes interested in him at once. Has he lost his right to privacy?

10 Times Law Reports 199

same case, 10 Times Law Reports 227

This was a case where one Munson was charged with a crime of murder in Scotland and the circumstances were such that the public attention was called to the case. About the time of the trial a corporation in London made a wax figure of Mr. Munson and placed it in their gallery, and he brought suit to enjoin them. The figure of Munson had been placed at the head of a stairway

leading down into the chamber of murderers. The court said if they had placed him below among the murderers, there could not be any question but that he could enjoin them. But could he enjoin them when he was just at the head of the stairway going down near enough to indicate that he had been acquitted by the verdict of a Scotch jury? This case was not finally decided, but I call your attention to the reasoning of the court. They intimate that under those circumstances it all depended upon where the image was placed, whether the company he was in was respectable.

Some of the courts hold that this right of privacy is a personal right and does not survive to the heir, that the heir and relatives can not object to any use made of the name or fame of the dead which does not affect the interest of the heirs.

15 N.Y. Supplement 787
same case, 64 Hun 594
same case 147 N.Y. 434

The facts in this case were that in 1892, before the Columbian Exposition, a woman's society in New York proposed to have an exhibition of two women, one of them Mrs. Schuyler, and another Miss Susan B. Anthony, and proposed to place the images side by side. Mrs. Schuyler during her life time was not an admirer of Miss Anthony, and so her relatives and heirs filed a bill to enjoin this society from making a marble image of Mrs. Schuyler and placing it in the Columbian Exposition by the side of Miss Anthony. The lower court issued an injunction, holding that they had no right to outrage the feelings of the relatives, since the relatives knew that if Mrs. Schuyler were alive her feelings would be outraged. But the Supreme Court of Appeals held that in the first place there was nothing outrageous in the production at all; that if Mrs. Schuyler was alive, unless she was finical, she could not object; that the heirs, even if Mrs. Schuyler herself could object, had no further interest in Mrs. Schuyler which gave them any property rights to be protected.

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April 5, 1901

T O R T S .

L E C T U R E VIII.

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At the last lecture I was calling your attention to the law protecting privacy.

A distinction is made between a public and private person in regard to the right of privacy,, so far as the publication of his picture or biography is concerned. It is true undoubtedly that the public generally have beem and are still desirous of knowing how a famous personage looks, and the courts seem to think that this curiosity constitutes and amounts to a public right to have such a person's biography and portrait published and offered for sale,, even if the person himself objects This is apparently the law:

57 Fed. Rep. 434
64 Fed. Rep. 280

In this last case the defendant proposed to publish a life of the inventor Corliss. Corliss himself had only once had his photograph taken and in some way the publisher obtained a copy of that photograph and proposed to publish this photograph in the biography. The widow of Corliss filed a bill to enjoin him from publishing the photograph. The matter came before the U.S. Circuit Court, and Justice Holt discusses this question as to whether a public character like Corliss had so far lost his right to privacy that the public could insist on having his photograph published, and the court held that a public character could not object.

The court in this case clearly intimated that the publication of a photograph or biography of a private person would at the request of such private person be enjoined.

It was intimated in this same decision that the right to prevent such publication is confined to the person and that such right does not descend to his heirs or near relatives; and I think that is the weight of authority.

121 Mich. 372
8 N Y Misc. Rep. 36

In this N.Y. case a person had his little daughter's portrait painted; a publisher in some way obtained a lithograph of that portrait, and struck off copies and proposed to sell them. An injunction was applied for to prevent the sale and it was refused.

CHAPTER VIII

In the 121 Mich. a tobacconist in Detroit made a lithograph of the late Col. John Atkinson, and had it displayed on cigar boxes. The widow filed a bill to enjoin the tobacconist from using the photograph for that purpose, and the Supreme Court of this state discusses this question of the right of privacy They unanimously come to the opinion that the widow of Col. Atkinson had a right to be offended and that her feelings were injured by such a use of the protrait of her deceased husband, but they come unanimously to the conclusion that such injury of one's private feelings can not be redressed by law.

I submit that it is absurd to say that a person has been injured and at the same time that there is no redress in the law, and that that principle is a sound one which holds that there is no injury which is not within the protection of the law . Undoubtedly it is frequently a greater offense to lacerate one's feelings than it is to lacerate his body, and subjects him to physical pain; and I think that the court ought to take that into account and protect the individual.

When a person that is injured applies to the court for protection, it is primarily to guard against his mental anguish and annoyance

In this connection I call your attention to the rule in regard to damages in the case of mental suffering separate from any other suffering In all cases where there is physical suffering, the result of physical injury, such suffering is an element of damages.

103 Ind. 355
36 Wis. 657; same case 17 Am. Rep.504
17 N.Y. 54; same case 74 Am. Dec. 420

As a rule mental suffering resulting from the breach of a contract is not the basis for damages.

88 Ga. 763
30 Am. St. Rep 183

In a few cases of breach of contract, mental suffering is considered. For instance, a breach of contract for marriage

Whether damages may be recovered for mental anguish in an action in which the plaintiff is not entitled to recover for other injuries is a question that has produced much conflict of decision. That is, where an action is brought, and the whole right to recover is based upon damages resulting from mental anguish not incident to other loss or damage, the weight of authority is that such recovery can not be had.

7 House of Lords Cases 577 3 Dakota 315
39 Kans. 93 44 Fed. Rep. 554

There are however a large number of cases where the courts have held that for mental suffering alone damages may be recovered.

107 N.C.449 82 Texas 539
same case, 27 Am. St. Rep. 914
86 Renn. 495

I will say that this is the rule in Texas, and there are more cases in Texas upon this question than all the other states combined.

Now I call your attention to a class of cases where injury is produced by fright without an assault at all.

The law does not recognize, according to some authorities, fright alone, unaccompanied by physical injury, as the basis for damages.

No matter what the result of the fright may be physically, unless the person causing the freight actually assaults the party injured, no recovery can be had.

151 N.Y. 109
175 Ill. 401
122 Mich. 466

No matter what the assault is, if there is anything that can be construed as an assault, then all the damages can be recovered. The law seems to be if you do not touch the person, you are not liable for any damages at all.

This conclusion of course is not one that strikes a person as a conclusion to which the courts ought to have come. They really put the reason of their desision upon the ground that it is impossible for a court or jury to know what the result of freight is, if there has been no physical injury; that so much depends upon the testimony of the person as to what his condition was; and therefore it would produce a large number of suits if they opened the door for persons to bring suits for damages where there had been no physical injury.

Now I call your attention to the subject of RELIGIOUS FREEDOM, and the torst growing out of it.

One of the evils incident to the union of church and state was at first religious persecutions. These persecutions were not confined to any particular people, or any particular form of faith or religious belief. The Mohammedan persecuted, the Jew persecuted, the Catholic persecuted, and the Portestant persecuted. And in this country today there is no better aid of religious liberty than all these sects combined

courts have held that [illegible] damages may be recovered.

"Here are however a few cases where

Religious freedom has had a steady growth in this country and today is far ahead of what it was a hundred years ago. If you examine the various constitutions of the several states now in force, you will find that the constitutions of the original thirteen colonies were not so clear, definite and particular in protecting men in the free and unrestrained exercise of religious belief as are those of the newer states.

The constitution of Michigan, perhaps, is a fair example of the constitutions upon this subject. Our constitution provides, Art. 4, Sec. 39; "The legislature shall pass no law to prevent any person from worshipping Almighty God according to the dictates of his own conscience, or to compel any person to attend any place of religious worship, or to pay taxes for the support of any minister of the gospel or any teacher of religion."

The next section provides: "No money shall be appropriated or drawn from the treasury for the benefit of any religious sect or state theological or religious seminary, nor shall property belonging to the state be appropriated for any such purpose."

Sec. 41 provides: The legislature shall not diminish or enlarge the civil or political rights, privileges and capacities of any person on account of his opinion or belief concerning matters of religion."

So you will see that a person is protected first in his person , secondly in his property, and lastly in his political rights .

Very recently the courts of this state have had occasion to examine these constitutional provisions, in connection with the question of Bible reading in the public schools.

The Board of Education of the City of Detroit adopted as a reading book in the schools of that city, selections from the Old and New Testament. These selections were made with a view of inculcating the moral precepts of the Christian religion, not the dogmas of any particular denomination or sect. One of the patrons of the school applied to the court for a mandamus to prohbit the use of this book, although one of the regulations of the Board of Education was that no one should be required to be present when the book was read. The Circuit Court of Wayne County granted the petition, holding that any selections made from the Scriptures would necessarily teach religion, and therefore feel within the constitutional provision above quoted.

Detroit Legal News May 15,1897

The case was carried to the Supreme Court of this state and you will find the decision at

118 Mich. 560

The Circuit Court does not give a definition of religion except to assert that any book which treats of the Almighty and his attributes, and of the relation in which man stands to his Creator, is necessarily a religious work. As an abstract proposition the court may be entirely correct, but at best it is only a definition of the Christian religion. The church lays quite as much stress upon a man's duty to his neighbor as it does upon his duty to his Creator Now there is the trouble in considering this question. If religion was confined exclusively to the relation in which man stands to the Creator and not at allto the relation which man stands to his neighbor, then we might get rid of religious instruction altogether, but so far as this law school is concerned, we are teaching that part of religion which relates to man's relation to his neighbor.

The Supreme Court in considering this same question and in construing that part of the constitution which says that no person shall be compelled to pay taxes or assessments for the support of any minister of the gospel or any religious teacher, held that religious teacher means in this constitution a minister of the gospel, and that consequently since the teachers in the public schools of Detroit were not ministers of the Gospel that the Bible, not extracts from the Bible, could be read in the public schools, without any violation of the constitution of the state of Michigan. One of the judges gave a dissenting opinion.

Now we do not think that the framers of the constitution intended to prohbit religious instruction altogether but sectarian instruction. Sound policy in certain communities may require that the Bible should not be read in the schools, but so far as constitutional rights are concerned, if there is no objection to its being read, it is no violation of the constitution to read it.

I give you a number of cases in which this same question has been before the courts in the other states, and call your attention particularly to the briefs in thexx case I have been commenting upon.

23 Ohio St. 211 76 Wis. 177
64 Ia. 367 12 Allen 127 38 Me. 379 53 N.H. 1
48 Vt. 444 121 Ill. 297 Cooley Const. Lim. 575-582

PROBLEM: Can religious books, that is, sectarian books, be purchased for a public library in states having constitutions similar to that of Michigan?

-----oOo----- Apr.12,1901

L E C T U R E IX.

---oOo---

GAME LAWS.

The state for the purpose of protecting game birds and animals can by statutue prohibit shooting or trapping them altogether, or it can regulate their capture.

You will of course understand that no individual has a property right in game that is naturally wild. The property right does not attach until the animal has been captured or has been domesticated. But so far as the state is concerned there is such a general property right in game that for the purpose of proptecting this general property right the state has a right to pass laws prohibiting the capture of game during certain season's of the year.

In the exercise of its police power the state can make it an offense for any person to transport game killed in violation of the statute.

133 Ill. 649

The state can under its general police power for the protection of game make it an offense to have in possession game during the season when the shooting or taking of such game is prohbited; and the fact that such game was killed in another state is no defense.

60 N.Y. 10
2nd Com. Pl. Div. 553
97 Ill. 320
7 Mo. Appeals 524

This case in the 2nd C.P Div. was a case where an English statute prohbited the having of ducks in one's possession during the closed season. A dealer in game in London was charged with the offense and arrested. The defense was that the ducks were shot in Belgium and had been shipped in to the kingdom. The English courts held that that was no defense, that the offense was having the ducks in his possession and he was liable under the statute.

If, however, the statute does not make the possession itself an offense, but simply makes the possession prima facie evidence that the game laws have been violated, the possession of game lawfully killed is not an offense. It depends therefore on the wording of the statute whether the possession of game during the closed season is an offense. 128 Mass. 410

76 Me. 80

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of the year.

In the absence of any statute
it an offense for a person to
tion of the statute.

[illegible]

[illegible] power for
[illegible] possession
[illegible] of such game is
is no defense.

[illegible]
[illegible]
[illegible]

I have called your attention to these few decisions upon this question vecause the matter is of growing importante all over this country. The legislatures of the various states have for several years passed been passing acts for the protection of all manner of game birds and fish; and undoubtedly in the future more stringent laws will be passed.

PROPERTY RIGHTS IN FISH.

Fish unless confined in a lot, tank or net, do not belong to any particular person, and the taking and carrying them away is not larceny. The same rule applies to fish that are not suitable for eating; they are not the subject of larceny.

There is no property right in fish unless they have been reduced to possession.

78 N.C. 481
6 Queens Bench 606

In this last case the court went to the extent of holding that where a fisherman had thrown his seine around a shoal of mackerel and captured them, and though the seine did not cover all the openings into the place where the shoal of mackerel was, yet experts testified that the mackerel could not escape from the seine into the sea, that where another fisherman pushed his boat through this opening that was left and captured the fish, that he was not liable for trespass. I do not understand why the court should have gone to that extent. It seems to me that when the fisherman had got his shoal in such a condition that they could not escape that his private property in the fish attached.

But the owner of a fishery in severalty has such a qualified interest in fish that he can maintain trespass against a stranger for taking such fish.

It is pretty difficult to harmonize this last proposition with the decision last referred to. If the fisherman instead of having that shoal of mackerel in his seine had beenthe owner of a fishery,open to the sea but having the exclusive right to fish there, and the other fisherman had come in with his boat and captured any fish within the limits of the fishery he would have been liable. This proposition is upon the theory that where a man is the owner of a park or forest he can prohibit the public from hunting there.

3 Cro. 553

The people of each state are sovereign and have the absolute right over all navigable waters and the soil under such waters within the boundary of the state, for the common use and

benefit of the people of such state.
16 Peters 367-410

So far as game laws are concerned each state can xpass any regulation which a sovereign nation can pass, unless it conflicts with some power which has been conferred upon the general government. Of course the general government has exclusive control of inter-state waters, laws regulating the navigation of navigable waters, admiralty laws, etc., and unless the regulation of a fishery or rights in fishing conflict with some of these powers which have been conferred upon the general government, they still belong to the state.

The territorial jurisdiction of a nation extends one marine league from low water mark.

Where the mouth of a bay or inlet is less than two marine leagues across, such interior bay or inlet is a water belonging to such nation. For since the jurisdiction of the nation extends one league from low water mark, and the inlet is not more than two leagues across, the jurisdiction of the state is over the whole.

States are regarded as independent nations in this respect except in so far as they have delegated to the general government exclusive marine jurisdiction and control over inter-- state waters.

A state can control fisheries within its jurisdiction, both as to shell fish and floating fish.

18 Howard 71
152 Mass. 235

In this case in the 18th Howard, the question arose inthis way: The State of Maryland had enacted a statute providing that any vessel employed in taking oysters with a scoop or drag should be forfeited A vessel was captured and prosecuted in rem for a violation of this statute. The vessel was enrolled by the U.S. and so the owners of the vessel raised the question that no statute of Maryland could forfeit a vessel enrolled in the U.S. service. But the Supreme Court held that this statute did not in any way conflict with the right of the U.S to govern waters, had nothing to do with international commerce or the marine jurisdiction of the U.S., and consequently if a U.S. vessel had violated a law of Maryland it could be forfeited the same as any other vessel.

Prior to Magna Charta the King could grant a fishery not connected with any right in the soil. It is called an easement in gross. This right of fishing was at first a royal prerogative, but it was one of the rights which the King yielded in Magna Charta. Law Rep. 7 Appeal Cases 633

The State owns the tide waters and the fish in them so far as ownership is possible.

A state ownership is the ownership of the citizens who compose the state. The state may therefore refuse to allow or permit a citizen of another state to fish in its waters.

94 U.S. 391

36 N.J. Law 507

But the citizens of a town can not by a by-law give the residents of such town any greater rights in a common fishery than the other citizens of the state possess.

3 Conn. 391 4 Mass. 315

I have already called your attention to the fact that tide waters belong to the state and the fish in those waters belong to the citizens of that state so far as property rights in swimming xfish is concerned. Now notwithstanding this, a person may plant a bed of oysters in a bay or arm of the sea, and if he marks it off by stakes, he acquires a qualified right in such bed, and he may prevent others from taking oysters therefrom.

The state has a right to grant the privilege to a citizen to plant these oyster beds, he paying a certain amount to the state for the license, and in many of the states such statutes exist; but in the absence of any regulation of that kind a person has a right to plant these oyster beds, and if he plants them and marks them so that the public generally can see what the boundaries are, he acquires an interest in the oysters or clams in that bed and the courts will protect that interest against trespasses.

Such bed of course must not interfere with the public right of navigation. All persons navigating the stream are required to respect such ownership, and if they willfully or negligently commit damages to such oyster bed, they are liable to the owner. Of course if a person navigating the waters finds it absolutely necessary to interfere with such bed, then he is not liable for unavoidable damages.

14 Qendell 42 75 Pa. St. 326

7 Qu. Bench 339 44 N.J. Law 74

When oysters are planted the bed must be marked so that the public may be informed of the private ownership.

50 N.J. Law 414 11 Barber 248

And the planting must not be in a natural oyster bed from which the public have a right to take oysters.

4 Barber 592 34 Barber 518

The general term fish includes shell fish.

53 Me. 164

In this 58th Maine, the question arose in this way: A man sold his business which was the sale of fish, including shell fish as well as swimming fish, and entered into a contract not to engage in the sale of fish in that particular locality. He afterward opened a store for the sale of oysters and the party who had bought his business brought suit, and the court held that his agreement not to engage in the sale of fish included all kinds of fish.

A grant of the soil in an arm of the sea, a bay or harbor, can be made to a town which will give such town a several fishery in the waters. A town having such right can lease the soil, and the lease will be valid, and any such person has the exclusive right to plant oyster beds thereon. You will find all along the Atlantic Coast cases coming within this proposition. Certain waters have been granted to certain towns, and the town has licensed a private person to plant oysters and sell them, and the revenues of many towns come largely from these licenses.

91 N. Y., 98.
60. N. Y., 56.

A riparian owner upon navigable waters at the common law owned to high water mark, and he had a right of access to the navigable part of such waters in front of his land, a right to make a pier or wharf for his own use and also for the use of the public. So that, although he does not own the land between high water mark and low water mark, he has the use of it provided he uses it so as not to interfere with navigation. Subject to such general rules as the legislature may impose for the protection of the rights of the public he may build such pier and such wharfs.

10 Wallace, 497.
14 Wallace, 57
109 U. S., 672
10 R. I., 477.

------oOo------

April 26, 1901.

In this [illegible] tion works in this way:
A man sold his [illegible] with fish, including
shell fish as well as [illegible] fish, and entered into a contract
not to engage in the sale of fish in that [illegible] locality.
He afterward opened a store for the sale of [illegible] the party
who had bought his business brought suit, and the [illegible]
his agreement not to engage in the sale of fish included all kinds
of fish.

A grant of the soil [illegible] on the sea at the [illegible], a bay or harbor,
can be made to a town which will give such town a material [illegible]
in the work. A town having such a right can lease the soil, and
the lessee will be valid, and any [illegible] person [illegible]
right to plant oysters does. [illegible] will show the
Atlantic Coast cases [illegible] within this [illegible]
[illegible] have been granted to certain towns, and the town has
[illegible] a private person to plant oysters and sell them, and
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[illegible]

A riparian [illegible] the navigable waters of the common
law owner to [illegible] and he has a right to access to
the [illegible] [illegible] in front of his land, a right to
make a pier or [illegible] and use [illegible] for the use of the
public. So that although no one [illegible] from land between
high water mark and low water mark, [illegible] the use of it provided
he uses it so as not to [illegible] with navigation. Subject to
such general [illegible] of the legislature may impose for the protection
of the rights of the public [illegible] may build such pier and wharf.

[illegible]

[illegible], 1911.

LECTURE X.

---oOo---

At the close of the last lecture I called your attention to the fact that the riparian owner of navigable waters owned to high water mark and that the government owned the strip of land between high water mark and low water mark where the tide ebbed and flowed.

Now the public have no common law right to pass over the land between high water mark and low water mark for any purpose except navigation or fishing. They can not pass over it with carriages for pleasure.

5 Barnwell & Alderson 268

The question arose in this case between the riparian owner and a person who had the right to fish in the sea. A hotel had been built above high water mark, and the space between high water mark and low water mark was used by the proprietor of the hotel for driving bathing vans which they use in England from the hotel to the sea, thus interfering with the fishing. The party brought suit against him as a trespasser for driving over the ground between high water mark and low water mark, and the court held that the proprietor of the hotel had no right to use that strip of land in that way.

The title to the soil under navigable waters at the common law, that is, waters where the tide ebbs and flows, is in the sovereign, and the right of fishing in such waters is also in the sovereign; but in the absence of a grant from the King to a private person of a several fishery, or in the absence of such a right acquired by prescription, the public have prima facie a right at the common law to fish in such waters, and any person claiming an exclusive right must establish it by grant or prescription. Such exclusive right the King could grant prior to Magna Charta.

10 House of Lords Cases 593
4 Burrows 2163
1 Modern Reports 105

The owner of the soil under fresh water streams has prima facie the right to fish therein as riparian owner.

The riparian owner has also the right to use the waters of the stream for the purpose of supplying power to machinery; and consequently he may construct a dam across the stream; but such dam must make provision for the passage of fish and be supplied with fish-ways, if the statute of the state requires such ways to be erected.

111 Ill. 581

In this case a person refused to comply with the statute requiring fish-ways to be constructed, and was prosecuted.

He claimed he had obtained by the use of his dam for a long period the right to maintain the dam. But the court held he could not obtain that right as against the state, that the state had the right to protect fish in all its rivers, and that this precaution in regard to fish-ways was a reasonable one, and that the owner of the dam must comply with it.

The right which any person has in fish swimming in public waters is at most a qualified right, and the state without interfering with or confiscating private property, can prohjbit the taking of fish in certain waters at certain seasons or in certain places. In other words, this right of the public to fish is subject to the right of the state to regulate fishing so as to protect game fish.

58 N.H. 598 30 Ind. 225
56 Vt. 641 107 Mich. 228
106 Mich. 621

In this last case there was a net set for the purpose of taking turtles and in capturing the turtles they captured fish, and they were prosecuted for capturing fish contrary to the statute. The court held that if the fish were taken accidentally but necessarily in order to capture the turtles, that the party capturing the fish with nets was not liable.

The general rule in this country is that an exclusive right to fish in navigable waters can not be acquired by grant, since the Ctown could not make such a grant since the discovery of this country. The right of the King to grant exclusive right of fishery was surrendered in Magna Charta.

The special right must be acquired through some act of the legislature, and when such right is acquired it is held subject to the right of the people to navigate the water; and if in the construction of piers and wharfs a fishery is injured, the damage can not be recovered. I call your attention to a case which has been before the Pennsylvania courts three times, in which this question is thoroughly discussed.

61 Pa.St.21; 77 Pa.St.310; 90 Pa.St. 85

In that case there was a right of fishery granted to a company, and afterwards piers and wharfs were built interfering with the taking of the fish. But the Supreme Court of Pennsylvania held repeatedly that the right of fishery that was granted to the company was subject to the right of the people to navigate the waters.

Any person may take fish in a navigable stream provided he can reach the waters and take the fish without trespassing upon the lands of another.

5 Pick. 199 53 Mich. 575

Since the stream is a public highway, and since the public have a right to navigate those waters, any person who is rightfully on the water has a right to fish while he is there, and the riparian owner who owns the soil underneath the water can not complain. You have no right, however to use the soil underneath

the water except for the purpose of navigation. You can anchor your boat if it is necessary in navigating the stream, but you may not anchor your boat for the purpose of fishing.

At the common law a fresh water river was not navigable unless its waters were affected by the tide, and only so much of the river as was affected by the tide was deemed at the common law navigable.

In this country all rivers and fresh water lakes are navigable if capable of being navigated in their natural condition, and such navigation is not confined to vessels, but is extended to rafts and even the running of single logs. In other words, the test in this country is not whether the tide ebbs and flows, but whether the waters of the stream are such that they canbe used profitably for the purpose of transporting merchandise.

3 Ore. 445 32 Iowa 106

The sea beyond a marine league from the shore belongs in common to the inhabitants of the whole world. No one can have any special interest in such waters. But the customs of those persons who navigate the sea or fish therein become binding upon all, and are to be regarded as an international custom.

4 House of Lords Cases 385
2 C & P. 595
22 English Com. Law 59

In thiw first case two vessels were engaged in capturing whales. One of them had harpooned a whale, but had been obliged to attach an inflated seal skin to the end of the cable and let the whale go. The whale was captured by the other vessel and suit was brought. The custom in those waters is that a fast fish belongs to the person striking him with a harpoon and continuing control over him. A loose fish is one that is not under the control of any boat crew. They held in this case, that although the inflated seal skin was fastened to the end of the cable, the fish was a loose fish and consequently belonged to the person who captured it.

The rule among the U.S. fisherman is that whether the fish is a loose fish or a fast fish, it belongs to the person first striking it with a harpoon.

This rule gives the whale to the first crew that successfully harpoons him, whether he escaped from the line and afterwards dies or not, unless the finder can cut him up before demand is made.

2 Low 110 8 Fed. Rep. 159
1 Spray 315 1 Low 223

PROPERTY IN SEALS.

As you know there are large herds of fur bearing seals on the islands of the U.S. off the Coast of Alaska. It is the custom of these animals to go great distances to other islands at certain seasons of the year. The U.S. Government took measures

to protect these animals when they were in the open sea and several vessels were siezed that were found engaged in capturing them. These vessels belongs to the citizens of Great Britain, and the English Government raised the question of the right of the U.S. to police Behring Sea and capture vessels that were taking seals in open waters. The contention on the part of the U.S. was that these herds of seals belonged to certain islands that they held possession of, and that when they left those islands to go several hundred mils into the open sea and then return to the islands, they were still the property of the U.S. while in the open sea; and they applied the common law rule that where a person has captured a wild animal that has the animus revertendi, if the animal leaves his possession and then comes back and had this intention of coming back all the time, the property was not lost in the animal. This rule is applied to pigeons, bees, etc.

This question was submitted to the Behring Sea Arbitration, and the U.S. attorneys made the above argument, which was answered by Lord Russell, who appeared for the British Government, in this way: He says the rule of the common law applies where the animus revertendi is one that the animal has acquired and not an instinct in the animal itself. He contended therefore that these herds of fur bearing seals while they are on the islands of the U.S. are property of the U.S., but when they leave the islands under their native instinct to go several hundred miles, and are more than a league beyond the shores of the U.S. islands, they are in the waters of the whole world and any one navigating those waters has a right to capture them.

That was the view that the commission took. They held that the U.S. had no right to protect seals beyond a marine league and incidentally they decided that no nation can protect animals of fish outside their territorial waters.

32 American Law Register 901

Game.

I use now the word game in the restricted sense of hunted animals.

The owner of the land upon which game is found has a qualified property in it so long as it remains upon his land, and if he captures the game there his title becomes absolute.

If the game escapes from his land to the land of another he loses all his qualified property inthe game. In other words, no person has any title whatever to wild game that is not upon his own premises.

In regard to such game captured by a third person who is a trespasser, it is said -

1st. If A starts game and kills it on B's land the game belongs to B.

2nd. If A starts game in the warren or enclosed ground of B and it escapes and is killed on the land of C, it still belongs to B.

3rd. If A starts game on B's land, and it escapes to C, and is then killed, it belongs to A.

The distinction between the second and third propositions is that in the second the lands are enclosed, and in the third they are not enclosed. In the one case you have taken possession of the game as it were; in the other the party was a trespasser only so long as the game remained on your land, and the moment the game left your land so far as you are concerned he ceased to be a trespasser.

1 Lord Raymond 250
11 House of Lords Cases 621

The three propositions which I have given you are stated by Lord Holt in the first case and approved by the House of Lords in the second case, except perhaps the last proposition, which may not be good law.

The Supreme Court of the U.S. have held that the title to game is in the state in trust for the people, and if the state prohibit the transportation of game it will be no violation of interstate commerce laws; and the court seems to intimate that the owner of land as such owner has no qualified property at all in game. I have stated to you that under the common law, the owner of land has a qualified property in game on the land. Of course it is of very little consequence, except where the game is driven from your land on to the lands of another.

161 U.S. 519

Some questions arise when game is hunted as to property rights between the person who stops the game and another who captures it.

All the courts hold that absolute property in game can be acquired only by reducing the game to possession. The difficulty arises in determining when such game has been reduced to possession. I will give you three propositions:

1st. Merely starting the game, not wounding or in any other manner disabling the game, is not sufficient to give possession.

2nd. Wounding the game mortally and then abandoning the pursuit of the game will not constitute possession.

3rd. Wounding the game mortally and then pursuing it so that if there was no interference it would be captured by you, is reducing the game to possession, and the person who wrongfully interferes with you in the pursuit of the game or who takes the game before you overtake it must surrender possession.

20 Johnson's Rep. 75

In this case a hunter shot a deer and followed it until night fall and then abandoned the chase. He took up the chase the next morning, but found the deer had been captured. The court held that if he had continued the chase the deer would have belonged to him, but since he abandoned the chase he lost all title which he had acquired by mortally wounding it.

----oOo----

May 3, 1901

3, 1851

LECTURE XI.

----oOo----

We will continue the subject of property rights in wild game.

Game belongs to the first occupant, but if one once siezes a wild animal and it gets away from him and he continues the pursuit, he does not lose his right as the first occupant. Therefore if a hunter mortally wounds a wild animal which escapes, but he pursues and the animal is captured by another, the animal belongs to the hunter that mortally wounded him and was in pursuit. This is the Scotch rule.

3 Scotch Appeals, House of Lords, 334
23 Session Cases 470

Bees are wild by nature, but when hived belong to the person who has thus reduced them to possession. But finding bees in trees standing on the land of another does not give the finder any title to the bees.

7 Johnson's Reports 16

A in this case found a bee tree on B's land and marked it with his initials. Then one of the tenants in common of the land cut the tree. The court held that the finder had not reduced the bees to his possession, and therefore he had acquired no title to the bees.

When a person is given a license to hunt bees upon the land of another and finds a tree, that does not give him title against another person who has a license and who finds this same tree and cuts it.

1st Cowen 243

It has been held that when a person is a trespasser he can acquire no title to bees captured by him.

15 Rhode Island 35

In this case a man placed an empty bee hive in a tree in B&s woods, and he placed this empty bee hive upon a tree in a favorable position for the purpose of allowing it to be occupied by the bees. When the bees swarmed they occupied the new hive, but the owner of the woods took it. Suit was brought by the person who had placed the hive for the value, and the court held that he was a trespasser in going into the woods and putting the hive ther, and being a trespasser, he was not entitled to the bees that filled the hive.

Bees in the possession of a person are the subject of larceny, and so is honey whether made by tame or wild bees. But wild bees and their honey, although they are in a tree and known to the owner of the land, are not the subject of larceny.

2nd East Pleas of the Crown 16, Par.41
104 Iowa 305
23 Grattan 441
3 Binney's Rep. (Pa.) 546

---oOo---

title to the bees.

Bees are wild by nature, but when they

to the owner of the field are not to be disturbed.

Dees seem to be an exception to the general rule of the common law that wild animals are not the subject of larceny unless they are valuable for food purposes. If bees have been reclaimed they are the subject of larceny because while the bee itself is not suitable for food, the honey is, and the common law courts make the distinction.

The keeping of bees is not necessarily a nuisance to persons residing in the neighborhood; and therefore an ordinance prohibiting a person from keeping bees altogether is too broad and will not be sustained. But the keeping of bees under certain circumstances may be a nuisance, and if such keeping is a nuisance it will be enjoined by the courts.

52 Ark. 23
6 N.Y. Sup. 826

In this last case a person kept bees in a village, and kept them so near his neighbor that they were a nuisance to his neighbor, fillinghis house whenever there was anything about the house that attracted them. He filed a bill to enjoin the keeping of the bees, and the court granted the injuntion.

THE TITLE TO DOMESTIC AND OTHER ANIMALS.

All animals are at first in a state of nature and wild, and consequently they become the property only of an individual who actually reduces them to possession, and they continue to be his property only so long as they remain in his possession, actually or constructively. Some animals have been so long and so continuously in possession and under the control of man that they are no longer regarded as by nature wild, and are classed as domestic, such as horses, cattle, sheep, goats, and barnyard fowls. The title to this class of animals is absolute, and is not lost by their straying away and remaining beyond the control of the owner. But an animal that is recognized by the court as naturally wild, if the party who has possession loses that control he loses the title.

69 Ga. 450
24 Miscellaneous Cases (N.Y.) 695
81 Ill. 403

In this New York case the question arose in regard to the title to a sea lion which had been captured off the coast of Alaska and brought for exhibition to New York. It escaped from the owner and was captured on the coast of Long Island more than seventy miles from where it had escaped. The original owner brought suit to recover possession of the sea lion, and the question was whether he had lost title to the animal by its escaping. The court held that the sea lion being by nature wild, the person capturing it was entitled to it only so long as it remained in his possession. The owner claimed that he should not lose title unless the sea lion had got to its original habitat.

This decision of the court has been criticised, and attention has been called to the fact that if in a railroad

accident where a menagerie was being transported, the animals escaped, the owner would lose title to all the wild animals. They would upon that theory belong to the person who captured them, and that doctrine could not be maintained.

Of course there is a distinction between the two cases. Animals escaping from the wreck of a train is different from a sea lion escaping and taking to the water, which is its natural element. Whether in the case of ~~xxxix~~ animals escaping from a menagerie the party would lose title to them has not yet been before the courts.

The increase of domestic animals belongs to the owner of the dam and not to the owner of the sire.

41 Ill. 238 60 Barber 413
130 U.S. 69 1 Kans. App. 577

In this connection I might give you a problem which is found in the books, though it has not come before the courts.

A goes to B and arranges with B to buy six head of cattle for him. B makes an arrangement to purchase the six head for A and also six head for C. The twelve animals are purchased for the two and belong to the two;,but by mistake five are turned over to one and seven to the other. After this division one of the cows purchased has a calf. To whom does the calf belong? The basis of the rule is that the increase belongs to the owner of the cow.

The lessee of animals stands in the place of the owner, and is entitled to the increase. So that if a herd of cattle is leased to A for a term of years, the entire increase of the herd, there being no contract changin the common law rule, belongs to the lessee and not to the lessor.

A tenant for life, however, must keep the original number good, and so must any other lessee when he covenants to return the same number which he has received. If there is no contract with reference to returning the number which he has received, and he has simply leased a number of animals, he is only liable for reasonable care, and if any animals die of disease, he is only obliged to return the number which remain, and he is entitled to all the increase. The contract of leasing may be just such a contract as the parties make between themselves.

When an individual has reduced a wild animal to possession he may maintain a civil action for the value against a person who carries it away or in any manner lessens its value.

But a wild animal reduced to possession was not the subject of larceny unless such animal was fit for food. Dogs, cats, apes, parrots, singing birds, and foxes belong to this class. 4 Blackstone 235

Swans and hawks were an exception to this rule at the common law because they were regarded as royal birds; and as I have already pointed out, honey bees were an exception, because the honey which they made was suitable for food.

1 Hale P.C. 511 2 East P.C. 16

This rule of the common law, which owes its existence in part to the rigor of the old common law which made the larceny of property to the value of a shilling a capital offense, does not meet with approval in many of our courts today.

41 Ark. 479 65 N.C. 315

In this 41 Ark. a person was arrested for stealing a mocking bird. The evidence was that the bird was worth $25. The defense was that although he could be sued for the value of the mocking bird, he could not be guilt of larceny because it was not the subject of larceny. But the court held that the rule of the common law did not prevail in Arkansas in that regard. The court also points out that what is not suitable for food is a matter of taste, and comments on a decision in Iowa in which the court held that a raccoon could not be stolen because the raccoon was not suitable for food, and said that so far as the negro population of Arkansas was concerned, they did not agree with the court of Iowa either in its taste nor in its legal opinion.

From the class of domestic animals in which the individual may have absolute property, there are two classes of animals that must be excepted: dogs and cats.

Of all domestic animals man has made the dog alone his companion, and yet at the common law the dog was not the subject of larceny for two reasons: first, because he had no intrinsic value, that is, a value common to all dogs as dogs; and second, because he is not fully domesticated. What is meant by his not being fully domesticated is that he retains many of his native traits.

31 Conn. 121 166 U.S. 698
37 Ala. 430 105 Iowa 112
84 Ky. 681

As we have remarked, many of the modern courts have not followed the strict rule of the common law that the dog was not the subject of larceny, and many of them have found in the legislation of the state evidence that this rule of the common law has been abrogated by the legislature.

86 N.Y. 365 75 Me. 562
148 Pa. St. 201 34 Mich. 283

In this last case, the question arose about a valuable dog having been killed by a neighbor's dog, and the owner of the dog that was killed brought suit to recover the value of the dog. Our court held without reference to any statute that the party could recover for the value of the dog and that there was absolute ownership in the dog, intimating that in this state the god was the subject of larceny.

Most of the legislation which has modified the rule of the common law has reference to taxation of dogs. Some states have levied a tax upon dogs in accordance with their value, permitting in some cases the owner of the dog to fix that value.

166 U.S. 698

In most states, however, the tax is a specific per capita tax upon each dog without any reference to its value, and such a levy must be regarded as a police regulation and not a tax. As an Indiana court has put it, the levy was made not for the purpose of producing revenue, but for the purpose of preventing the production of dogs.

79 Ind. 9

Although the dog has no intrinsic value under the common law and therefore could neither be stolen nor obtained by false pretenses, an action of trespass, trover or replevin could be maintained at common law to recover damages for any injury to him or for his conversion or to obtain possession of him.

60 Ill. 211 100 Tenn. 317

77 Ind. 132

Dogs are so far recognized as personal property at the common law that if not disposed of by will they go to the administrator and not to the heir.

41 Ark. 479 86 N.Y. 365

But they are not inventoried as property of the estate.

75 Ga. 444; same case, 58 Am. Rep. 476

48 Ala. 161; same case, 17 Am. Rep. 31

When a domestic animal becomes vicious, acquires the habit of doing mischief, and the owner or keeper has notice of that fact, actual or implied, the law imposes upon such owner or keeper the duty of preventing such animal from doing mischief and keeping him secure, and upon his failure so to do it makes such owner or keeper liable to any person who without any fault of his own has been injured by such animal.

74 Mich. 202; same case, 14 Lawyers Rep. An. 187

Contributory negligence of the persons injured in order to relieve the owner of the animal from liability must be of such a character that it can be affirmed that he caused the injury himself with a full knowledge of its probable consequences. In other words, a person is guilty of contributory negligence if he interferes with a dog he knows to be vicious.

121 Mich. 675 73 N.Y. 204

31 Conn. 130; same case 81 Am. Dec. 175

This case in the 121 Mich. is a celebrated case on account of the amount of the judgment which was recovered. A wealthy man was the owner of a large St Bernard, and one afternoon two of his hired girls took the dog out with them. They called at a house to visit the wife of the owner and the dog was let into the house. This becomes important because they held that letting the dog into the house was contributory negligence on the part of the wife. The St. Bernard attacked a child in the house injuring it seriously. Suit was brought against the owner of the dog and the jury gave a verdict of $10,000., which under the law of this state, the court was required to double. The case went to the Supreme Court of this state who reduced the judgment one half.

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May 10,1901

tax

LECTURE XII.

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In continuation of the last lecture upon the liability of persons keeping wild or vicious animals:

A person is held to be the keeper of a dog and liable for his torts if he permits the animal to live at his house, with or without the consent of the owner of the dog, and even against the protest of the owner.

66 Mich. 519 81 Northwestern 974

In the first case the owner of a dog protested against another person harboring the dog. The person harboring the dog was a relative of the owner of the dog, and fed the dog at his house. While there the dog bit an individual and suit was brought against the person harboring the dog. The defense was that he was not the owner or keeper of the dog. The court held that a person who harbored an animal under those circumstances was liable as a keeper.

In the next case a widow was the owner of a farm and made an arrangement with her son to cultivate the farm. He was the owner of a dog and he brought the dog with him. The dog bit some person and suit was brought for damages against the owner of a farm, and the court held that the owner was liable.

At the common law the husband being at the head of the family was liable for the torts of any animals kept upon the home premises, and under certain circumstances of course was liable for the torts of servants or children. Under the old common law the family was the unit, and the head of the family was held responsible for the conduct of the family.

A question has sometimes arisen in regard to the liability of animals that are kept at home where the property is owned by the wife. The liability of the husband or wife under such conditions depends upon the surrounding circumstances.

185 N.Y. 201 81 Hun 111
101 Ala. 433 152 Mass. 7
19 Ontario 39

In the first case the husband was the owner of a vicious dog. The wife was the owner of the home and paid the household expenses. She evidently kept her husband and his dog and she was held liable for the dog's torts, showing that the liability goes with the power.

In the next case, 81 Hun 111, the wife was the owner of a dog and the husband was the owner of the home and paid the household expenses; and the court held that he was liable for the torts of his wife's dog.

In the Massachussetts case, the husband was the owner of a bear and he kept the bear upon his wife's real property. The bear broke his chain and committed damages, and suit was brought against both husband and wife, and the court held

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for his torts [illegible] [illegible] [illegible]

that both were liable, the husband as owner of the bear and the wife for permitting the bear to be kept upon her premises in an unsafe conditi on.

Since many dogs are naturally vicious and they are liable at any time to become vicious, and all are subject to hydrophobia, the state may adopt reasonable police regulations, providing under what circumstances and conditions dogs may be permitted to run at large, and also requiring that no dog shall be kept unless the owner has obtained a license; and the state or municipality may direct that any dog not licensed or not properly muzzled may be shot either by the proper officer or by any person a member of the public; and such regulations are held to be valid.

18 Pick. 262 69 Miss. 34
35 Neb. 638 42 N.H. 373

Dogs with vicious habits, sheep killing dogs, may be killed if found upon the premises of another where there is an opportunity for them to do mischief, and although they may not at the time have shown any disposition in that direction.

122 Mich. 273

In this case a dog that had the reputation of killing sheep was found upon the premises of a neighbor and was shot at sight. Suit was brought to recover the value of the dog, and the court held the farmer had a right to kill the dog under those circumstances.

When a dog becomes a nuisance by entering x upon the premises of another and there barking, fighting, etc., the occupant of such premises has the right to abate the nuisance by killing such dog if under the circumstances such killing is reasonable and necessary.

90 Mich. 221

In this case a man was annoyed at night by dogs congregating upon anadjacent lot and fighting. Several times he drove the dogs away but they returned, and finally he fired into the lot and a valuable dog was killed. The court held he was justified in abating the nuisance.

But a dog may not be killed because he is a mere trespasser and is doing some slight damage as a trespasser to the premises of another.

96 Mich. 236 93 Mich. 420

In the latter case a valuable sheperd dog ran from the highway upon a porch that had been freshly painted, leaving his footprints upon the fresh paint, and the owner of the house shot him. The court held that the owner was liable for the value of the dog, because he was not justified in shooting the dog. He could bring an action against the owner of the dog for the damages which the dog had done to to the porch.

On the subject of the liability for the torts of animals, Judge Cooley says that when wild animals are kept for some legitimate purpose, all the public can demand of the keeper is that he shall use such superior precautions as will be sufficient to prevent such animals from doing mischief and which the natural propensities of the animal justify or demand his doing.

In this statement, Judge Cooley modifies somewhat the rule of the common law, holding that if a person keeps a wild animal he is an insurer of the animal, and if the animal gets loose and does mischief, no matter what precautions he may have taken, the owner of the animal is liable.

1 F.& F. 92 33 La. An. 627
99 U.S. 645

In this first case a person who had a pleasure resort kept a bear fastened with a chain six feet long. A member of an excursion party walking by the bear's house was attacked and severely injured. The bear had not before been vicious. The court held that the statement in the declaration that the defendant knew the bear to be vicious must be taken as proved, as everyone must know that such an animal is of a savage nature. You will notice that in this case the court did not follow the rule suggested by Judge Cooley.

In the 99 U.S. 645, a person was injured by a stag, one of a herd of nine deer kept in a park at a summer resort. The stag was known to be vicious and notices were posted to beware of the animal; yet notwithstanding these notices a person went into the field where the deer were kept and was attacked by the stag and severely injured. The court held the owner of the resort liable, and the court in that case established these three propositions, to each of which your attention has been called:

1st. That when such animals are by nature vicious, the owner is liable under all, or most circumstances.

2nd. If the animal is naturally vicious or mischievous, but it is of a tame nature, there must be notice to the owner of the mischievous habits before the owner canbe held liable.

3rd/ In case of a domestic animal the owner is not liable unless he knew the animal was vicious.

Upon this last proposition I shall comment somewhat in this lecture. I think the proposition goes too far. Some dogs are not vicious, but there are certain breeds of dogs that are naturally vicious, and if a man keeps that breed of dogs he must use precaution to see that they commit no injury even if they have not heretofore committed any injury.

The keeper of an animal may be liable for an injury done by such animal when the injury is due to the negligence of the keeper and not to the vicious nature of the animal.

24 Law Times, new series, 587

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In this case a person had two hounds, and tied them together with a rope three or four feet in length and permitted them to go upon the street. A person going upon the sidewalk was thrown down and brought suit against the owner. The dogs were not vicious, but the injury was due to the fact that they were fastened together. The Court held that the owner was liable for the injury.

The keeper of an animal is negligent if he does not guard against the natural propensities of such animal.

126 Mass. 506. 42 Ill. App. 186.
173 Mass. 411.

In this first case the owner of a bull three years of age which never had been vicious, was led through the streets of Lawrence, Mass. with a snap in his nose and a rope attached to the snap. The animal was quiet until a lady came along dressed in white, with a red sash and this excited the animal. The keeper struck the animal, and the animal turned upon the keeper, threw him down and commenced to gore him. A traveller rushed up and struck the animal, and was himself thrown down and injured. The question was whether the owner of the animal was liable, and whether it was contributory negligence on the part of the traveller to rush up under such circumstances to prevent the injury to the keeper. The Court held in this case that the animal was not properly secured, because the owner should have known his natural propensities, and should have taken notice that on the streets of Lawrence he was very liable to meet a person dressed in white with a red sash; and the held, secondly, that it was not contributory negligence on the part of the person in those circumstances to try to save a human life.

A person may not keep a vicious or dangerous animal upon his own premises if others are permitted or licensed to go upon such premises, or if such keeper knows that others are accustomed to go upon such premises. One may not endanger the lives of others with vicious animals, any more than he may endanger the lives of others by setting spring guns, or digging pit-falls for that purpose.

14 Neb. 84. 122 Ind. 403.
155 Pa. State 225. 17 Fed. Rep. 265.

In the case in 122 Ind. 403, there was an action brought for injuries by a boy who had been butted by a vicious ram. He had gone upon the premises where the sheep were kept, but the Court held that the owner of the ram was liable for the damages inflicted.

Under the English decisions a trespasser may not recover when he is bitten by a vicious dog, but may if he goes upon the premises upon lawful business.

4 C. & P. 497. 5 C. & P. 489.

The law is more liberal in the U.S. to the mere trespasser.

31 Conn. 121 124 Mass. 44

In both of these cases the court held that if a person was a mere trespasser, but that the trespass which he had committed did not contribute to his damage, and he had no means of knowing that there was a vicious animal on the premises, that the ownef of the animal was liable; going to the extent of holding that if you keep a vicious animal on your premises you must take the precaution of notifying the public generally, so that if any ones goes upon the premises they will go with knowledge that there is a vicious animal there.

For instance, a person has upon his premises a bull that is vicious. A person may desire to cross the field, not because he has any business with the owner of the field but because he desires to reach some place by a short cut. He is a trespasser of ocurse if he goems upon the field, but his going upon the field in that way does not contribute to his injury, the courts hold. He has done nothing to excite the animal, and the owner of such an animal knowing that the public are liable to go upon the field even as trespassers, is required to put up notices so that any one may see that a dangerous animal is kept in the field, and if such notices are not posted the owner has not taken the precautions that a reasonable man is required to take in order to protect himself from liability.

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May 17,1901

TORTS.
LECTURE XIII.

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This lecture is a continuation of the subject of the last lecture on the liability of persons keeping domestic animals that are dangerous or produce injury, where the owner has knowledge, either actual or constructive of the habits and disposition of the animals.

When a personhas dangerous animals upon his premises, he is bound to give notice of that fact to the public.

Although going upon the field of another is in one sense a trespass, yet the circumstances may be such that a person is obliged to go upon the field, or he may have a license to go upon the field. For instance, if a man's hat is blown off by the wind,or there is any other good reason for going upon the premises of another, he is not a trespasser; and if there is a dangerous animal in that field the owner must give notice so that he can guard against danger.

When a third person is handling an animal that has dangerous habits, the owner is required to give notice of such dangerous habits, if they are likely to cause damage; otherwise not.

Consequently if a person goes to a livery stable to hire a horse and the horse has dangerous habits, the livery man is bound to notify the person hiring the animal of those dangerous habits.

67 Barber 118
62 Minn. 175

This minnesota case goes a little farther than the proposition I have just given you. In this case a lady was employed to ride at a running race at a county fair. The horse that the lady rode in the race had no vicious habits, but one of the animals that was to engage in the race had the habit of bolting, and the lady was not informed that one of the horses that would be in the race had that habit. The result was that in the race the other horse bolted and her horse was overthrown,and she was injured. She brought suit against the society for damages. The charge was that while they knew of the vicious habit of the horse that was to be in the race, the habit of that horse was not disclosed to the lady; and the court held that they were under obligations to notify the lady of the vicious habits of the other animal,and were liable for damages for not doing so.

The owner or keeper of vicious animals is sometimes relieved from liability when the injury is due to the negligence of the person injured, but the general rule is that such negligence to constitute a defense must be wanton and willful; that is, it must be such negligence as immediately contributes to the injury.

For instance, if a person is teasing a dog, and the dog bites him, the court will charge that the injury was due to the negligence of the person, and that that negligence was willful and wanton.

73 N.Y. 347
48 South-western 1081

In this last case a dog was kept by a livery man in a lot back of his place of business. In this lot there were certain animals for sale belonging to the livery man, and the person desiring to purchase some of the animals went into the vacant lot to view them. The dog was chained, but the person passed within the length of the chain and the dog bit him. The defense was that he ought to have taken notice that since the dog was chained he was dangerous. But the court held that the negligence in this case was not willful and wanton, and since the person was rightfully upon the premises, the owner of the dog was liable.

Except in cases of animals naturally wild (ferae natura) the owner or keeper is not liable unless he knowledge actual or presumptive of their propensity to do mischief; and the person seeking to recover must show such notice.

That is the general rule. So far as dogs are concerned, the statutues of many states has changed this rule of the common law and made a person liable for any injury which his dog may do without any reference to whether it was the first or second injury done by the dog. In other words, a person keeps a dog at his peril. And in this state the statute has said that the judgment for damages which the jury gives shall be doubled by the court.

125 Ind. 531
74 Mich. 203
88 Ill. 132

These decisions are not upon the statutes to which I have called your attention, but upon the common law rule, that if a person keeps a horse, cow, or any other domestic animal, the class to which they belong not being vicious on account of their domestication, he is not liable for their injuries unless he knew of the vicious character of the animal.

We have seen that a person who keeps a wild animal naturally dangerous does this at his peril, and the distinction between the two is this: If the wild animal has been reclaimed he is bound to take notice of his natural propensities, and that he is liable at any moment to do mischief, no matter to what extent he has been tamed and domesticated.

2 Strange 1264
72 N.Y. 195

A domestic animal is one that is used for the protection or profit of the owner. The common law rule is that if this domestic animal is vicious and the owner has notice of its being vicious by having done damage previously, the owner keeps him at his peril; that is, he is an insurer of the public against a second injury.

But the better rule seems to be that the owner must use reasonable care, and he is not necessarily liable because he keeps an animal that may injure a third person; but if he keeps a dog that may injure a third person he must used reasonable care to prevent his injuring such person.

For instance, a man keeps a watch dog. A dog as a watch dog would be utterly worthless unless he would bite under certain circumstances. A person may be upon the premises of another where there is a watch dog rightfully. Now if he is injured while upon the premises of another by being bitten by a watch dog, is the owner of the watch dog liable? At the common law he is. But the better rule is that the owner of the dog is not liable if he has used reasonable precautions to prevent the dog from injuring a person who goes upon the premises rightfully. What precautions he shall use of course depends upon the premises, upon the character of the dog and under what circumstances the dog is liable to bite.

41 Cal. 138
61 Ark. 196
Cooley on Torts 348

At the common law the rule, as we have said, was that the owner of a dog was not liable for his first offense. But the better rule seems to be thatthe owner is not necessarily relieved from liability in an action brought against him for the first injury committed by the dog. The keeper or owner must use reasonable care, and what is reasonable care depends upon the natural character and breed of the dog.

52 Vt. 251
105 Mich. 693
33 Mo. Appeals 218

Some courts have gone to the extent of holding that when the owner of an animal has knowledge that he has done an injury, he is then liable for other injuries done by him of a different character. This is unquestionably the rule in all cases where the injury is of the same nature.

For instance if a dog bites A and the owner keeps him and he afterwards bites B, the owner is unquestionably liable to B for the injury. But if the dog kills A's sheep and afterwards bites B,must the owner conclude that because he is a sheep killing dog that therefore he is liable to bite persons?

Some courts have gone to the extent of holding that if a dog develops a vicious habit in any direction, he is a dog that the owner keeps at his peril, because having gone wrong in one direction he is liable to go wrong in every direction.

64 N.H. 64
2nd Ill. 338
11 Iridell's Law Rep. 269

As a general rule when several animals do a joint wrong, as when several dogs unite in killing sheep, the several owners of such animals are not jointly liable for all the damage done, but each is liable simply for the damage done by his dog. It is very difficult to prove sometimes how much damage was done by each dog.

2nd Vt. 9
9 Ind. 72
17 Wendell 562
3 Ill. Appeals 531
2nd Conn. 206

In this last case an action was brought against several persons for mischief done by their dogs, and the court held that to make them liable jointly would be to confer upon the dogs the power of agency, and that was absurd.

Now to remedy this defect in the rule of the common law, many of the states have passed statutes holding that the owners are jointly liable, and I am inclined to think that that ought to be the rule under the common law because it is a joint wrong. If A, B & C have sheep killing dogs and the three dogs get together and kill thirty sheep, each ought to be liable for all the damage done not only by his dog but by the other dogs that his dog has associated with; because the owner of sheep killing dogs is bound to take notice of the propensity of his dog not only to kill sheep but in killing sheep to associate with other dogs.

Under a Massacussetts statute which simply made the owner of a dog liable for "all damages done", the court held that such owner was liable for all the damages when several dogs engaged in the killing of sheep, and that in a case where one of the dogs was owned by the owner of the sheep killed.

160 Mass. 186

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May 31, 1901

F I N I S.

U N I V E R S I T Y O F M I C H I G A N

LAW CLASS OF 1904

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PRELIMINARY LECTURES

O N

B I L L S A N D N O T E S

B Y

P R O F E S S O R R O B E R T E. B U N K E R

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Reported by Munter

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Edwards Brothers

Publishers

Ann Arbor

1902-3

LECTURE I

-- oOo --

The subject of this course is provided for according to the announcement madein your general schedule. We start out with an amendment, temporarily, of that schedule, for the purpose of presenting to you something of the history of this law under which you will pursue the study of bills and notes and checks. You are to follow in themain the subject as it is treated by Mr Huffcut in 'The Negotiable Instruments Law'. I do not want you to understand that we are to study the law of any particular state or the statute of any legislature, but the general principles of the law of bills and notes and checks.

The basis of the work which you have is the negotiable instruments law. I shall not stop now to speak about that, but I will stop simply long enough to warn you that you are not to study the law of New York. I will say in passing that the Negotiable Instruments Law as adopted in New York and the other states having it is simply a codification of the law of bills and notes and checks.

The comprehensiveness and extent of the subject of this course can hardly be overestimated. The comprehensiveness of the subject is indicated somewhat by Volume 7 of the American Digest. This volume is given up entirely to a digest of the cases on bills and notes in this country. It covers from the beginning to 1896. Now it will readily occur to anybody that the adjudications on this subject in England and her colonies are at least as extensive as those in the United States. Then you have doubled your digest. Furthermore, questions of guaranty and suretyship are very closely connected with the law of bills and notes. They are governed by a different rule, controlled by a different law, but those questions are intimately connected with the question of bills and notes and checks. That also covers a large field.

We speak of this subject as the law of bills and notes and checks. That is a little narrow. That is what we shall consider MOSTLY, but there is other paper to be considered. Mainly however the law which we shall consider concerns itself with bills and notes and checks. They are otherwise called 'negotiable instruments'. That is the title that Mr Daniel gives to his work. Mr Randolph gives the title 'Commercial Paper' to just about the same subject matter. Others speak of 'bills and notes.' And Mr Parsons and Mr Story limit the title of their works to 'Bills and Notes'.

Commercial paper, or negotiable instruments, includes more than bills and notes and checks. It started out with embracing simply foreign bills; then it embraced inland bills; then it added promissory notes, and then checks. The law which governs these negotiable instruments is a growing law. It grows like the common law. It reaches out and covers other instruments which business makes it necessary that it should cover. E. G., when Mr

Story wrote his work on promissory notes there was no such thing as a coupon bond. And Parsons knew nothing of a certified check. It didn't appear in the books at that time. And yet in 1870, in a case in the U. S. Supreme Court, Judge Swayne said that it was computed on good authority that the average daily transactions in the City of New York in certified checks was $100,00,000. Now it must be at least 5 times that today, or at any rate $200,000,000. So you can see why this law has to keep growing to meet new conditions. Not many years ago it was held that a certain kind of scrip of foreign governments came under the head of commercial paper, and that too notwithstanding it was not payable in money. And ore receipts, &c, as well as warehouse receipts, are also marching to take their place among negotiable instruments, if they have not already got there.

Now what are these neogtiable instruments? I hope you have not gathered from anything I have said that there is anything peculiar about them. There is no peculiarity. A negotiable instrument is a contract. A man who makes his promissory note thereby agrees to pay to somebody certainly designated a certain sum of money at a certain time. That is a contract. All negotiable instruments are contracts; but they are contracts governed by a peculiar law—a law peculiar to them, and a little less peculiar than it was originally because it being administered by the common law courts, some of the features of the common law have been impressed upon this law.

Now the law that governs negotiable instruments is the 'law merchant'--lex mercatoria. If one of the parties to a contract for the sale of a thousand bushels of wheat makes default in his part of the contract, an action arises in favor of him who has suffered, provided that damages have ensued. You will all say at once that this is an action at common law. You offer yourself as a passenger to a railroad company, and their agent says, 'I cannot carry you on this train; you will have to wait till the next train.' 'But is there no room?' 'Yes, but people of your class we don't carry on this train.' If that amounts to a discrimination, an action arises in favor of the party who has suffered--not at common law, but by reason of the statute. So up to this time we have two kinds of law--common law and statute. You offer freight to the owner of a vessel. The contract of affreightment is entered into. Some misunderstanding ensues, by which one of the parties suffers, as he conceives, damages. He brings an action against the other. There is a contract affecting maritime matters, and you go to the Court of Admiralty. A man injures your property and threatens repetition of the injury. You cannot apply to a court of law, either under the common law

or under the statute; but you apply to equity, and equity restrains the tort-feasor by its writ of injunction. And so we have the common law, statute law, admiralty and equity. And still we have not reached the negotiable instrument.

Take the case of an ordinary promissory note: the maker gave it without consideration, the payee transfers it to one for value and in good faith, and he transfers it likewise to another, who brings action against the maker; and the maker says, 'I don't owe this; no consideration ever passed to me for it.' In an ordinary contract that plea would be good, and however remote the assignee was from the maker of that contract he could not recover, because no consideration had passed. But in the case of this promissory note it makes no difference that there was no consideration moving to the maker of that note, if a remote indorsee in good faith and for value brings his action against the maker. Why? Because the customs of merchants have made that defense untenable. The law merchant by its own customs has provided that such a defense is not available. It is about the law merchant that I want to speak to you.

Every lawyer and every judge should know something of the law merchant.

Negotiable instruments had their origin in what has been called the customs of merchants, or law merchant, or lex mercatoria. This means the customs of merchants and tradesmen reaching back, at any rate, toward early in the middle ages. The custom merchants had of paying bills and discharging their debts and dealing with each other in a more convenient way than by handing over money. It is perfectly safe to say that at this day at least 90 per cent of the business of the country is transacted thru the medium of negotiable instruments. It may safely be said that the law merchant grew up something like the common law of England: it grew up out of the interests of commerce and business. What its exact origin was, or when it became the custom of any country, is not definitely known. It may be safe to say that it had its origin on the continent of Europe. It was so general as to have been classed as a branch of the law of nations. You will find Lord Mansfield saying in an early decision that it was a sort of law of nations. It was imported into England as Equity and Admiralty were, but unlike them it was not permitted to wear its native garb but was clothed in the dress of the common law. The opinion in the case of

Goodwill v Roberts

declares that these customs were introduced into England from the Venetians and Florentines. There were three periods of the development of the law merchant in England (1) From the earliest times down to the time Coke became Chief Justice--1606; (2) from the time of Coke to the time of Mansfield--1756; (3) from that time to the present day.

I want to impress upon you at the outset that the law merchant was not a part of the common law, altho in its administration by the common law courts of England some features of the com-

mon law were impressed upon it. You will need to bear in mind that the law merchant is a separate and distinct set of customs, and that the law today as applied to bills of exchange, promissory notes and checks, whether it be the law pronounced by the courts or enacted into the statutes, is the law merchant, not the common law. You should remember that the law merchant was not a native of England; the common law was. The common law was old and well understood when the law merchant was imported into England. The nature of a contract was well understood before the law merchant made its appearance in England. Now this law merchant includes many things other than bills, notes and checks, but in England the common law has so impressed itself upon those matters, and was so nearly like the customs of merchants in those other respects, that the distinction between them is lost sight of.

All maritime contracts were at one time contracts of the law merchant. Many things relating to carriage, now and for a long time regulated by the common law, were regulated originally by the law merchant. So with insurance. But all these other things have been so impressed by the common law as to have lost nearly all traces of their origin. The main thing that we now speak as being governed by the law merchant is NEGOTIABLE INSTRUMENTS.

FIRST PERIOD OF DEVELOPMENT OF LAW MERCHANT IN ENGLAND.

During this stage--from the beginning down to Coke's Justiceship--the law merchant was administered in special courts, composed of persons learned in the usages and customs of business, and not those learned in the law, the common law. Those courts were made up of different judges according to circumstances. In some places they were composed of the mayor of the town and two or more assistants, and those assistants were always men who knew about the customs of merchants and so were familiar with the questions which should be presented to the court.

These courts were both speedy and irformal. It was a maxim of the law almost, 'Give the merchant speedy justice; he cannot tarry long here.' We recognize that principle to day in some of our courts. These courts were called the DUSTY-FOOT COURTS, both because suitors generally came into them with feet dusty from the fairs--the usual time for holding these courts--and because justice was supposed to be dispensed there as speedily as the dust fell from the feet of the suitors.

These courts were courts of record, incident to every fair, and were held only during the time that the fair was in progress. They had jurisdiction over cases that arose in the fair or market. The cause of an action arose and was determined during the particular fair and not before or at any former fair, nor after the fair. The cause was to be determined the same day that it arose. In order to give the court cognizance of a case, the plaintiff was required to make oath that the contract or subject-matter was within the jurisdiction and time of the fair. These courts might hold a plea in the sum of forty shillings, and it is

(Continued)

said that judgment might be given at any fair at a court held at the same place. Where the court was held within the manor of a lord, the lord's steward was generally the one before whom the court was held, and the trial was by merchants and traders in the fair. If the fair was in an incorporated town, the mayor was the presiding judge, and certain assistants helped make up the court.

FOR TWO CENTURIES the difficulties and discriminations which arose from the misunderstandings of merchants were determined by these courts. The suits in these courts were tried according to the usages of merchants, and for a long time even after the common law courts took up this subject-matter of the customs of merchants, the declaration ran, 'according to the custom of merchants.'

Sept. 25, 1902 -- 8 A. M.

LECTURE II

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Very little of practical importance to the law merchant as it is administere d today and has been administered for two centuries was added during the first : I have mentioned (to 1606). The SECOND PERIOD (1606-1756) began when the common law of England was on a sound footing. At this time the courts which had had jurisdiction over these matters growing out of the law merchant had practically disappeared. As a system they went out when Coke came in. The courts of common law took their place. Because common law judges and lawyers knew very little of anything else than the common law. Common law courts were then fighting any encroachment upon their jurisdiction, as they have done ever since.

There were at least two reasons for the disappearance of these special courts. One was the growing importance of the common law and the other was that these informal courts had no means of enforcing their judgments. Some litigants refused to comply with their judgments, and they had no means of enforcing them. Mr Bigelow says in his work that what these courts needed was not customs, because them they had; nor was it a sufficient body of law, because that they had, but what they did need was a sheriff, and by that he means that what they needed was some officer of the law to execute the judgments which had been pronounced. It was perfectly natural that the business of these courts should have been turned over to the common law courts instead of to the equity or admiralty courts. Equity and admiralty are strangers to the law of England; they have maintained their independence all along the line; but the law merchant was overshadowed by the common law, and the common law has impressed some of its features upon the law merchant.

WHAT ARE THE PECULIARITIES OF THIS LAW MERCHANT, and what

are the peculiarities in reference to these negotiable instruments? They are at least three (1) CONSIDERATION; (2) GRACE and (3) NEGOTIABILITY. It may be said too that there is a peculiarity about JOINT PARTIES.

The peculiarity in respect to CONSIDERATION with negotiable instruments is this: not that there should not be a consideration, because a consideration is just as essential in these instruments as in any contract of the common law. But at common law, in an action based upon a contract, the consideration must be alleged and proved. When one brings action on a negotiable instrument, the consideration need be neither alleged nor proved. One makes a sufficient case if he declares that the defendant executed and delivered this particular negotiable instrument. But there must be consideration nevertheless. In negotiable instruments consideration is always PRESUMED; in common law contracts consideration must be alleged and proved. In suits upon negotiable instruments, the defendant must prove lack of consideration if he relies upon that as a defense.

Again: when a man makes a contract at common law, he undertakes to perform on a certain day, and if he does not perform on that day he is from that time in default and action can be immediately be maintained against him. Not so with the negotiable instrument--unless it be modified by statute. When a man makes a promissory note payable at a certain date he has, under the law merchant, three days of grace after the date named in which to pay, before he is in default. He has this grace in the case of all promissory notes EXCEPT those payable on demand--there is no grace to those. Men were perhaps given this latitude because of the difficulty of transferring money in the early days. In these days there is no such reason for grace, and the Negotiable Instruments Law has abolished it.

The next and great distinction between common law and law merchant contracts is NEGOTIABILITY, and by that is meant that property of an instrument which enables it to pass from hand to hand by delivery or by endorsement, and makes it perform the office of money. At common law, if A owed B money, B could not assign his claim to C and bring suit upon it in his own name. That was called a 'chose in action'--a right to claim something from somebody--and that could not be assigned. But in negotiable instruments, by the custom of merchants, the transferee of that instrument by delivery or endorsement clothed the assignee or the deliveree with all the powers that the assignor or endorser had, and sometimes made that instrument good in the endorsee's hands which was not good in the endorser's hands. I hold a note from Mr Adams; there was no consideration for Mr Adams's making it; I cannot enforce it as long as it is in my hands. I endorse it over to Mr Clark for value. He takes it without notice that there is a lack of consideration. It is good in his hands--I have transferred a right which I could not enforce myself. But had that been a common law contract, my assignment of it would have given Mr Clark no better rights than I had.

Now when the common law courts took up the matters that had been administered by these special courts, they were confronted

by these exceptions and difficulties. The common law lawyers and courts did not know anything about a contract where a consideration was presumed., where time was extended by grace or a contract that passed from hand to hand by delivery or by endorsement, and sometimes was better in the assignee's hands than in the assignor's. So the common law, which is filled with fictions, resorted to the fiction in the manner of expressing consideration and raising upon that consideration a promise. This will be illustrated later.

There was another thing impressed by the common law courts upon the law merchant, and has always remained impressed. And that is JOINDER OF PARTIES. In the ordinary common law contract, if two men engage to do anything they engage to do that thing jointly; one does not do it without the other; both are bound to do it; neither is bound to do it except in the company of the other. In the law merchant contract the liability of those two joint makers is a several liability. It is a several liability in the common law contract, but they are not suable severally. Under the law merchant they ARE suable severally. But the common law courts impressed that feature of the common law in such a way that it has lasted all this time, and the suit upon a joint note must make both of the parties defendants, altho the holder of the note may pick out any of the parties and sue any he pleases, [illegible] except that if they have joined once he cannot sever them.

It was in some such way as this that the common law courts took up the work which had been done in the special courts of the law merchant. During that 150 years little progress was made in the development of a system. Coke and his followers determined that Jones should be Brown, or Brown should be Jones, in a PARTICULAR case; but he did not determine, as Mansfield afterward determined, that when Jones did be Brown in a particular suit, it furnished a precedent for every other person within the jurisdiction of those courts. The one man was making a principle and the other was deciding a case.

The first case that appears under the law merchant--and that is a little before Coke-- is

Martin v Buller, Cro. Jac. 6

This is the first case determined under the English law, in which a case was determined under the law merchant and its principles. In 1613 the case of

Ostley v Taylor, 1 Cro. Jac. 306,

was decided. This case determined this question: A plea was interposed that the acceptor of a bill of exchange was not a merchant at the time he accepted the bill, and for that reason he was not liable in the action. It was a question of pleading, and the declaration did fail to show that at the time the defendant accepted the bill he was a merchant; and the court held the plea good; i. e., he must not only be a merchant (for they held the law not to operate upon anybody else), but the declaration must show that he was a merchant at the time he accepted the bill. Now relying upon the strength of that decision, the son of a doctor about 1692 accepted a bill of exchange and repudiated it,

pleading that he was not a merchant when he accepted it, but a gentleman. Well the court said that if he was gentleman enough to accept he ought to be gentelman enough to pay, and they would hold him to that obligation. So you see they no longer hold here that these obligations are good only between merchants.

In 1698 the case of

Brumwich v Lloyd, 2 Luckw. fol. 1585, p 667,

was decided. In that case it was said by the Chief Justice: 'Bills of exchange at first were extended only to merchant strangers truding with English merchants, and afterward to inland bills between merchants trading with one another in England, and after that to all traders and dealers; and then to all persons, whether traders or not; and there was no need to allege any custom of merchants.'

The chief objection that is urged to this period is that it developed a very insignificant system. Who is it that is making this law at this time and putting it in shape? The courts are doing it, and there is so far no legislation whatever on the subject. There were no very important precedents during that period.

THE ENGLISH PEOPLE HAVE GROWN AWAY to some extent, but in the harmony of progress, from the original idea of the negotiable instrument. This may be shown by a comparison of the French and the English system as to bills of exchange. The French, by the way, adhere as much as possible to the original idea; the English carry it along to meet the convenience of the business world.

ENGLISH IDEA OF BILL OF EXCHANGE	FRENCH IDEA OF SAME
(1) An instrument of credit.	(1) A trade transaction.
(2) Full play to accommodation paper--'let a man help his neighbor all he will.'	(2) Endeavors to stamp out the accommodation feature.
(3) Not necessary to express value on the face.	(3) Nature of value must be expressed.
(4) May be drawn payable in some place.	(4) Must be drawn payable in a distant place, so that there may be a possible exchange.
(5) May be drawn to bearer.	(5) Must be drawn to order.
(6) If acceptance is refused, right of action accrues at once.	(6) No cause of action unless the bill is again dishonored at maturity.

Thus, under (1) at French law, if one of you gentleman needed money and should wish to draw on his father, you could not make that draft, because it would have to be a TRADE transaction.

(7) A measurable distinction between current and overdue bills.	(7) No distinction whatever.
(8) No protest for inland bills.	(8) Protest for all bills.

So far we have found only two of these instruments of the law merchant negotiable--the foreign and the inland bill. In 1680 the first case was decided in which it was held that the promissory note was negotiable.

Sheldon v Hentley, 2 Show. 106

That case made the promissory note negotiable. It was followed until the time of Lord Holt. He overturned that doctrine in

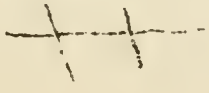
Clerk v Marvin (1702), 2 Ld. Raymond 758,

and he was just about holding up another case on a promissory note and was fighting with the merchants when the Statute of Anne was passed to cure Lord Holt's crankiness. Remember this: the promissory note was in 1680 held to be negotiable; in 1702 Lord Holt held that it was NOT negotiable, and then in 1705 Parliament interfered and passed the Statute of Anne, which is a declaratory statute and so purports to be. It declares what the law is on this subject. It reads as follows:

'Whereas it hath been held that notes in writing, signed by the party who makes the same, whereby such party promises to pay unto any other person or his order any sum therein mentioned, are not assignable or endorsable over within the custom of merchants to any other person, and that the person to whom the sum of money mentioned in such note is payable cannot maintain an action by the custom of merchants against the person who first made and signed the same, and that no person to whom such note shall be assigned, endorsed or made payable can, within the said custom of merchants, maintain action upon such note against the person who first drew and signed the same; Therefore, to the extent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as inland bills of exchange and shall be negotiated in like manner, Be it enacted'

'That all notes in writing whereby any person shall promise to pay to any other person or his order, or unto bearer, any sum of money mentioned in the note, shall be taken and construed to be payable to any such person to whom the same shall be payable; and also every such note shall be assignable or endorsable over in the same manner as inland bills of exchange are, according to the custom of merchants; and that the person to whom such sum of money is payable may maintain an action for the same, as he might do upon an inland bill of exchange made or drawn according to the custom of merchants; and that any person to whom such note is endorsed or assigned, or the money therein mentioned ordered to be paid by endorsement thereon, may maintain his action for such sum of money, either against the person who signed the note or against any of the persons that endorsed the same, in like manner as in cases of inland bills of exchange.'

That Act of Parliament settled the negotiability of promissory notes. You know in England the court cannot say that the Act of Parliament is unconstitutional.



Sept. 25, '02--2 P. M.

LECTURE III

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The THIRD PERIOD or stage of development of the law merchant in England was the period commenced by the administration of Mansfield. Mansfield went on the Bench in 1756, and from that time to this, or at least to the time of the enactment of the Bills of Exchange Act in England and the Negotiable Instruments Law in this country, is embraced in the third period. The PECULIAR CHARACTERISTIC of this stage is the system which was established. Mansfield has been called the 'Founder of the Mercantile Law'--the father of it in England. The second period, as we saw, was without system--the cases were sporadic. The questions were determined by the particular case, or whether the particular instrument was to be admitted into the family of negotiable instruments. So far the negotiability of three instruments had been established: the foreign bill of exchange, the inland bill and the promissory note.

There were two or three things which made it possible to inaugurate a SYSTEM under Mansfield, and the first of those things was the great ability of the man himself--a great lawyer, who made a great judge; a man of independent thot; a man who was of a creative mind; a man who was of a systematic mind--a judicial mind. He made these innovations: he got about him 'special juries', so called--i. e., he got a coterie of men to act as jurors who were well acquainted with the customs of merchants, with the details of trade; and those questions which came before the court were decided on a systematic basis by this judge and by his special juries.

He did not confine himself to precedents that arose in England: he reached out over the entire field of precedents and took whatever commended themselves to his judgment. I do not mean to say that he CREATED these things, further than a systematic arrangement of them may be regarded as a creation. His taking of precedents from every source is illustrated in

Luck v Lyne, 2 Burr. 882 (1760)

In 1884 another case was decided in England upon the same lines:

Svenson v Wallace, 13 Q. B. D. 73,

but that was decided on English precedents alone. There were no precedents in England when the case of Lucke v Lyne was decided.

Now because Mansfield used this authority from foreign lands, he provoked an attack from Junius, who said that they had on the bench of England a man who disregarded English law and who was administering the law of foreign countries.

So much for Mansfield's METHODS. The PRINCIPLE of his decisions was announced by himself in Luck v Lyne: 'Cases should be determined not only for the greater satisfaction of the parties in the particular case, but to prevent other disputes by making the rules of law and the ground upon which they are established, certain and notorious.' A better doctrine for the decision of cases could not be announced, and that is the doctrine

which all courts pretend to recognize.

When people accumulated so much gold or plate or precious property that it became hazardous for them to retain it about their persons or in their possession, they deposited that property with some trusty and capable person; so banks arose. These were at first, thus, something like the trust companies or safe deposit vaults of today. They issued a receipt, or a due bill, or a bill, for that property deposited with them. Hence arose bank bills. Now the bank bill on which the first case arose was something like the silver or gold certificate of today. There is behind every such certificate an amount of bullion to secure it. If the note were lost--if it should be found by somebody--if it should be stolen--it would be good in the hands of the party who found it or to whom it came in due course of business in good faith for value. This is true only of negotiable instruments. The first case on that proposition with reference to banknotes is

Miller v Race, 1 Burr. 452 (1758);
Smith's Lead. Cas. 9th Ed. 490

Here plaintiff was refused payment of a banknote which had been stolen and had come into his hands without notice of the theft, for value. The bank teller even held the note from him, and plaintiff brot trover and recovered the note. Now if that had been a watch instead of a note, the plaintiff would not have been entitled to it as against the owner. But the common law governs the watch; the law merchant governs the note.

A CHECK IS a bill of exchange drawn on a bank by its customers, payable on demand. The first case in which the negotiability of the check was determined, is

Grant v Vaughan, 3 Burr. 1516 (1764)

That was an opinion by Mansfield, who calls the instrument a 'cash-note.'

A late case involved a kind of Prussian scrip which, when it reached a certain amount, entitled the holder of it to a bond--not to money. That was held to be negotiable and the law merchant was held to have grown to embrace that new feature of business. Another case involved the negotiability of post office orders, payable in a certain way as proscribed by statute; and it was held that under the circumstances of that case the order was not negotiable.

A check used to be made payable to BEARER, and it was not until the reign of Victoria that it was enacted by statute that a check might be made payable to order; and that is the origin of the custom called 'crossing checks', which prevails in England but not here, and which is recognized by the Bills of Exchange Act. Crossing a check is the drawing of two parallel lines, or two slanting lines, across the face of the check and writing within those lines the words 'and company'. That species of crossing is called a GENERAL CROSSING. What does it mean? It means that the holder of that check cannot get the money on that check unless he has an account at a bank. This is done to protect the bank, which is the object of all the English laws on the subject of

checks. Now with the words of a bank between those lines, the check is a SPECIALLY CROSSED check. For instance, you find there the words 'Baring Brothers': then that can be paid only by Baring Brothers. Now these checks are further crossed with respect to negotiability. A check is made payable to order, but between those lines is written 'not negotiable'. What does it mean? Simply that if the payee transfers it he gives the transferee no better right than he has.

LEGISLATION.

I said to you yesterday that this law was a sufficient law to give every person his rights under these instruments, and to make justice convenient for the trader, if no statute existed. But every state has enacted something with reference to negotiable instruments. But in our 40 or 50 states it turns out that there is a conflict of authority--e. g., what is a promissory note in one state is not a promissory note in another. England was not subject to that difficulty, because in England there are not so many independdent jurisdictions, and what is law in one county is law in another; and still England in 1882 passed what is called the Bills of Exchange Act.

You have seen how this law has grown up and where it lies. It lies in thousands and thousands of cases, in the conflicting decisions of courts thruout the entire legal literature. That was true of England as well as of this country, but of course there were not so many conflicts there. But still England thot it necessary to enact a law on the subject of negotiable instruments--not to create anything, but to collect and put in one place all the law on that subject. That was done in the Bills of Exchange Act of 1882. Now if England had occasion to do this, this country had much more reason to do it, because there was less uniformity. And when men did business in different states, they felt the inconvenience of taking an instrument valid in one place and finding it invalid in another. Hence the cry came for uniformity. So that, following the example set by England, a Committee of the American Bar Association on uniformity of law, at their meeting in 1895 in Detroit, urged following the example set by England c. along the lines adopted in enacting the Bills of Exchange Act. While they did not say that in so many words, they really followed the Bills of Exchange Act.

That committee employed Mr John J. Crawford to make a draft of a bill. Mr Crawford was a commercial lawyer of repute in New York and was a good deal of an expert on mercantile law. He made the draught which is the basis of the Negotiable Instruments Law. He submitted that draught to the Committee, and the Committee submitted it to leading American and English lawyers and judges and invited criticism. Mr Crawford did not go to the extent that the Committee afterward did in making changes in the law.

Mind you, the Bills of Exchange Act is simply an expression of what the law was in England at the time of its

enactment* The Negotiable Instruments Law is in the main an expression of what the law relating to negotiable instruments is, in the United States. Now there were differences, one state differing from another; so they could not get it to hit every state; and there were certain features of the law which they wanted to wipe out anyway. GRACE was one of them; so that law abolishes grace.

The Committee made some changes in the line of a departure from the existing law which Mr Crawford did not feel warranted in making. Mr Crawford has annotated the Negotiable Instruments Law, and his work has gone into two editions. I do not mean to say that there was any occasion for annotating the statute, because only five or six cases have arisen since the statute was passed. What he has annotated are cases arising under the law merchant, and he shows by that annotation how this law differs (if it differs at all) from the general law.

Now, altho there was passed in New York a negotiable instruments law, the law of bills, notes and checks has not been changed to any appreciable extent. Even in those jurisdictions where the statute has been adopted, this law is just he same as it was in all the essential parts. 16 or 18 other states beside New York have adopted the Statute, and they adopted the same law, because they are after uniformity. There would be no sense in their adopting different laws--that would defeat the very object of the statute, which is to secure uniformity thruout the Union on this important subject.

F I N I S

Sept. 26, 1902.

LECTURE IV

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PARTIES PRIMARILY LIABLE ON NEGOTIABLE INSTRUMENTS.

The contract of a party who is primarily liable differs from the contract of a party who is secondarily liable. Of the parties primarily liable I shall speak today of the

MAKER AND THE MAKER'S CONTRACT.

There are three parties to negotiable instruments who are under all circumstances primarily liable: the maker, the acceptor and the certifier. The drawer may under certain exceptional circumstances be primarily liable, but we will leave him until we come to consider the drawer's contract.

I want you to bear in mind that a party who is primarily liable is LIABLE CLEAR UP TO THE EXTENT OF THE STATUTE OF LIMITATIONS, and whether any demand has been made upon him for the performance of his obligation or not, and whether any notice has been given or not. His liability does not depend upon conditions precedent or subsequent, or any conditions at all - his liability is absolute.

CONTRACT OF THE MAKER.

When I say the contract of the maker you will understand me to refer simply to the maker of a promissory note. The contract of the maker differs from that of every contract of parties to negotiable instruments. The contract of the maker is EXPRESSED ON THE FACE OF THE PAPER, and all his contract lies within the four corners of the paper. It is an EXPRESS CONTRACT. And that contract is to be performed precisely as he has declared - with one exception; and that is, the time of performance of that contract is by the general law merchant extended three days beyond the time stipulated. That is called GRACE. But where the Negotiable Instruments Law is in force grace is abolished and his contract is precisely as he states it.

No evidence is admissible to show that the maker's contract is OTHER THAN WHAT IT PURPORTS TO BE. E. G., the maker of a note cannot be permitted to give evidence that the arrangement was that he was to renew that note at its expiration, instead of paying it. This is true even in equity.

Hall v 1st Nat Bank, 173 Mass 16

No more can he give evidence that the arrangement was that he was not to be liable on that note, because there he contradicts the terms of his written contract, and that he is not permitted to do.

Gums v. Geikie, 108 Mich 295

So much of the contract as I have mentioned is express; there are however certain parts of a contract IMPLIED; and those are these: That the maker admits in law the EXISTENCE

OF THE PAYEE, if the payee be an existing person. He admits the payee's then CAPACITY TO INDORSE; i. e., he admits that the payee is a person who is capable of making the contract of indorsement; he could not be heard to say that the payee is an infant or married woman or lunatic, &c.

You have already learned that the SIGNATURE to one of these instruments - and that applies to promissory notes - may APPEAR ANYWHERE. The language of the Negotiable Instruments Law is that the instrument 'must be signed.' So that it leaves the general rule as it was.

Taylor v Dobbins, which you have had, is a case where the signature appeared in the BODY and the note ran, 'I, A B, promise;' etc. The court held this just as good as if the signature had been written at the bottom. The usual place for the signature however is at the lower right-hand corner. It is sufficient if the signature be written in any form intended to IDENTIFY THE MAKER. The figures '1 2 3', for instance, have been held a sufficient signing when it was proved that it was intended thereby to identify the maker. When the signature is in the usual place in the lower right-hand corner the intention of the party is fixed and the law presumes that he intended to be bound by the instrument, and it presumes it from the fact that he put his name in that place. If he puts his name in another place, the presumption does not run to that extent and the holder must show that he intended to be bound. That is all the difference there is; it simply shifts the burden of proof.

All that is true in the ABSENCE OF FRAUD in regard to the instrument itself, or fraud IN ESSE CONTRACTUS - not fraud in the inducement, not fraud in the leading up to the note, but fraud in the very making of the instrument.

Porter v Harvey, 88 N W 458
79 Pa St 370

That cannot be better illustrated than by the latter case, where a party procured from a farmer a contract by the terms of which the farmer hired himself as agent for a manufacturing company, but which was so cleverly worded that by cutting off part of the paper it became a promissory note. This is an illustration of fraud in esse contractus, and such a note is absolutely WORTHLESS, even in the hands of a bona fide holder, and this for the reason that it is not the contract that the man made.

The SIMPLEST FORM OF CONTRACT is where a promise is made by a single person to a single person. Mr Bigelow calls this the 'typical' contract. While it can be said to be typical only in the sense that it involves the liability of one person merely and does not raise any question of joint liability or of capacity, etc., let us for convenience CALL it the 'typical' form.

THE FIRST DEPARTURE from this typical form is the note signed by two or more. Now the question comes: Is the liability joint

or is it joint and several? That depends upon the expressions in the instrument. Men may make themselves jointly liable or they may make themselves jointly and severally liable. If they are jointly liable they must be sued together; you cannot separate them; you cannot sue one without suing the other. If they are jointly liable, each is indivisibly liable. Now this may be a joint obligation or it may be several as to each. Which of these it is, is to beascertained from the instrument itself.

HERE IS AN EXAMPLE OF AN INSTRUMENT WHICH IS JOINT; 'We jointly promise', or 'I, A B, as principal, and I, C D, as surety, promise.'

When a note IN TERMS DOES NOT DECLARE THE INTENTION of the parties, it is a matter of construction. The rule of construction is this: If there is nothing to indicate a different intention, the promise is joint. For example, 'We promise to pay John Doe $1,000 three months from date. A B; C D.' Here nothing is said, but the rule of construction makes that a joint and not a several obligation. If it be joint, then each is liable for an indivisible part of the obligation.

There are NOT AS MANY RIGHTS OF ACTION AS THERE ARE PARTIES, and it has been held that if suit is brot against ONE of the parties without objection, no action can be maintained against the others. One suit is all you are entitled to bring.

IF THE JOINT PROMISORS ARE NOT PARTNERS and there is no agency, no breach of the contract occurs before the day of maturity unless by demand and refusal. When this contract is joint and the joint obligors are not partners, then a demand must be made upon each before default. When they ARE partners, then a demand upon one is equivalent to a demand upon all. The partners' contract of course differs from other joint contracts in that each partner acts for the firm, and the refusal of one to pay is the refusal of all. But a note executed by a partnership must be executed in the partnership name.

(2) ANOTHER DEPARTURE FROM THE 'TYPICAL' CASE is where one signs as surety. He thinks he is going to avoid some obligation by adding the word 'surety' to his name. Now the mere addition of that term to the signer's name does not affect it at all; does no harm nor good to anybody. But if the payee or any of the parties know that his relation to the note is actually that of a surety, then of course the payee must respect the rights of the surety: he cannot take any step that will involve the surety in greater obligations than he has already assumed. If the fact of suretyship is shown upon the note, the holder must govern himself accordingly. The promise of the surety is simply a promise the same as that of the maker - with one exception; it is a promise sub modo, a promise involving conditions. It does not affect the holder of the note at all if the fact of the suretyship is known to simply the maker and

his surety. Whatever arrangement they have makes no difference to the holder of the note.

(3) THE THIRD DEPARTURE FROM THE 'TYPICAL' CASE is the signing as agent or in a representative capacity. There is hardly any subject connected with the mere framing of bills of exchange and promissory notes that has occasioned more litigation than the question of the personal responsibility of those who did not really intend to be personally responsible. If some of you should be trustees of a church and in the discharge of your duties should give a note for an indebtedness of the church, you could not avoid personal liability by simply adding your name as trustee: signing 'J. B. Ferguson, Trustee First Congregational Church.' The courts have time and again held such notes to be the personal obligation of the signers notwithstanding they disclosed the principal. The addition of such words as 'trustee', 'agent', &c., does not affect anyone's liability any more than if he had put after his name his profession or trade. ONE WHO DESIRES TO AVOID PERSONAL LIABILITY should sign in the name of the principal: 'St James Church, by H. D. Hobson, Trustee'; 'J. B. Ferguson, by H. L. Jimson, his agent.'

Tucker Mnfg Co v Fairbanks, 98 Mass 201

It is not enough to disclose the principal; the undertaking should PURPORT TO BIND the principal, in order to exempt the signer.

S & L Bank v Dix, 128 Mass 148

Here are examples which exempt the parties, tho they sign as agents: 'I, as treasurer of the Episcopalian Church of Saline, or my successors in office, promise:' 'We, as trustees but not individually, promise to pay,' &c.

If the agent has not the authority which he professes to have, he may be liable, but he would be liable on HIS WARRANTY and not on the instrument; and there is a good deal of difference there. If he is liable on the instrument he is liable to all who come after him; if he is liable on his warranty only he is liable simply to the next one.

One who BEFORE UTTERANCE becomes a party to an instrument is a maker and an indorser, or he is what he can show himself to have been. I mean one, not mentioned in the instrument, who puts his name on the back of it before utterance. Under the LAW OF MASSACHUSETTS, prior to the Negotiable Instruments Act, he is a MAKER; under the LAW OF NEW YORK, before and after the Negotiable Instruments Law, he is an INDORSER. Presumptively A MAKER in VERMONT, but nevertheless sustaining such a relation to the instrument as oral evidence may show the understanding of the parties to have been. This makes him, in the states following the Massachusetts rule, the same as a maker, with all the liabilities and rights of a maker. In New York and the states following it he is an indorser, with all an indorser's rights and liabilities: secondarily liable only.

-- November 6, 1902.

LECTURE V

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There will be a lecture next Thursday at 2 o'clock - this in addition to the exercises of the forenoon.

THE LIABILITY OF PARTIES SECONDARILY LIABLE is determined by the default of those who are primarily liable, and notice of that default. You want to discriminate once and for all time between the liability of the primary party and the liability of the secondary party. One is liable absolutely; the other cannot be held liable unless those steps which the law merchant or the statute prescribes, aretaken in exact accordance with the provisions of that general law or of the statute. Those conditions precedent are due presentment, demand, protest (where protest is necessary) and notice. We have considered the contract of the maker, who is the party primarily liable on a promissory note; let us now consider the contract of that party primarily liable on a bill of exchange, namely,

THE ACCEPTOR.

In the first place, what is a bill of exchange? Your statute defines it thus: 'A bill of exchange is an order in writing by one person upon another person to pay to a third person, or to his order or to bearer, a certain sum of money.' The definitions of this term are various, but they all lead to the same end. This is Mr Daniel's definition: 'An open letter addressed by one person to a second, directing him in effect to pay absolutely and at all events a certain sum of money therein named to a third person, or to any other to whom that third person may order it to be paid; or it may be payable to bearer, or to the drawer himself.'

Daniel's Negotiable Instr., Sec. 27

Of this definition you have had all the elements except one, and that is that the bill must be an OPEN letter. Open here means unsealed. The drawer must simply attach his name and not put his seal to the instrument, else it will not, under the general law merchant, be a bill of exchange. By the unwritten law merchant, a bill or note should not be under seal.

Brown v Jordan, 32 Minn 135; Text, p 283

Although the instrument should possess all the other requisites of a bill or note, its character as a commercial instrument would be destroyed, and it would be a covenant governed by the rules affecting common law securities, If it were sealed. But the mere attaching of a seal to the signature would not have that effect: there must be some reference to the sealing in the instrument itself, such as, 'Witness my hand AND SEAL', 'signed and sealed', &c., or there must be something other than what I have mentioned in the instrument to indicate clearly that the instrument was designed to be executed with the seal of the drawer. The later decisions re-

ject the doctrine that the seal destroys the negotiable character of an instrument possessing the other requisites of negotiability. The Negotiable Instruments Law provides that the validity and negotiability of an instrument are not affected by the fact that it bears a seal. This drawing away from the old common law rules as to the necessity of seals has grown, no doubt, from a desire to get away from the old technical forms and also from the fact that almost all instruments executed by corporations must bear the corporate seal.

OF THE PARTIES TO THE BILL THERE ARE the drawer, the drawee, (out of whom the acceptor is made) the payee and the indorsers. Their liability runs in this order: acceptor; drawer (virtually as first indorser, tho the payee is really first indorser) and then the indorsers in order. A bill of exchange may be made by one person: he may draw on himself; he may himself accept; he may be the payee; and he may be indorser. This however is not usual.

KINDS OF BILLS.

Bills of exchange are of two kinds: (1) foreign and (2) inland, or domestic. A foreign bill of exchange is one which is drawn in one state or country and payable in another state or country. It is made foreign by the fact that it is made in one jurisdiction and payable in another jurisdiction; tho the parties thereto may live in the same jurisdiction. The States of the Union are foreign to each other so far as the question of determining what are foreign bills of exchange.

THE BILL OF EXCHANGE AROSE out of the necessity and convenience of bills. A man about to go to the Philippines owes a man in Manila $1,000. There is a man in Ann Arbor who owes him $1,000. When he arrives in Manila he gives his creditor there a bill drawn on his debtor in Ann Arbor, and according to commercial usage that is good anywhere; that is an instrument of credit; that saves the necessity of the man carrying $1,000 in currency from Ann Arbor to the Philippines; that discharges two debts at one transaction. The ordinary check is also a bill of exchange, tho there is of course some difference between it and the usual form of bill.

WHEN YOU DRAW A CHECK ON A BANK and draw $100 out of a $1,000 deposit, or when you give one of your creditors a check, do you by that act transfer to his account $100 of your fund in the hands of that banker? The statute declares that the drawing of a bill is not an assignment of the fund. A bill does not of itself operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee is not liable on the bill unless and until he accepts the same. There has been a good deal of refinement and discrimination over the question as to whether the drawing of a bill is equivalent to the assignment of the fund protanto, or for the entire amount. (A garnishment of that fund in the hands of the drawee would not avail any more than it would avail to garnishee a bank in which you have deposited money

for which you have taken a certificate of deposit. You could garnishee a running account, but not a certificate of deposit, because the bank does not know in whose hands that certificate is: it is negotiable: so is the bill drawn on the drawee.)

AT THE INCEPTION OF A BILL the drawer draws upon the drawee; his drawing is in effect an order to the drawee to pay; and if the drawee conforms to that order he becomes an acceptor, acceptance meaning the compliance by the drawee with the order of the drawer. The drawee thereby makes the promise his own. The DRAWEE IS UNDER NO OBLIGATION TO THE HOLDER of that draft; he does not owe him anything; he has made no contract with him; he owes him no duty. So the holder cannot sue the drawee AS SUCH either on the instrument or on any contract or in tort. He cannot sue him in contract because the drawee has made no contract with him; he cannot sue him in tort because the drawee owes him no duty. But when he accepts, then he HAS entered into a contract. Nor does the drawee OWE THE DRAWER ANY DUTY TO ACCEPT that draft. He may OWE him, but he is not obliged to accept the draft because he owes him or because he has funds in his hands belonging to the drawer. If he does not accept - if he refuses to comply with the order - the matter is left just where it was when the parties started, and the drawer has only his common law action against the draweefor the debt.

NOBODY BUT THE DRAWEE CAN BECOME AN ACCEPTOR. Nobody can come up and take his place. Somebody can associate himself with the drawee for greater security, but the drawee must become the acceptor and nobody else can. If no drawee be named in the bill it is under ordinary circumstances a note OR a bill.

Funk v Babbitt, 155 Ill 408, also in text

ACCEPTANCE IS OF TWO KINDS, (1) proper and (2) quasi. Proper acceptance may be (1) absolute or (2) on condition. When the drawee puts his name on the face of a bill, with some such word as 'accepted' or 'good', &c, he then becomes a debtor and he makes a proper acceptance. That acceptance any party to the bill is entitled to and may insist upon and, if he does not get it, may declare the bill dishonored. And the holder of the note is NOT ENTITLED TO TAKE ANYTHING EXCEPT a proper absolute acceptance. And circumstances arise where if he does take anything less than an absolute acceptance he discharges parties who otherwise would be liable to him.

QUASI ACCEPTANCE IS SOMETHING LESS than proper acceptance. Proper acceptance is made on the bill itself, manifested by the signature of the party, or on a paper attached to the bill. An acceptance on condition is a species of proper acceptance, and when accepted on condition the acceptor is liable in ac-

cordance with the tenro of the acceptance. Of quasi acceptance THERE ARE THESE VARIETIES: An acceptance written ON A SEPARATE PAPER NOT ATTACHED to the bill. Where that acceptance is made there must be by proper proof a proper identification between the paper on which the instrument appears and the negotiable instrument which is alleged to have been accepted. A TELEGRAM IS A SPECIES of that sort of quasi acceptance, and it has been held that an acceptance by telegram is good.

(2) The second kind of quasi acceptance is ORAL. An oral acceptance is held to be good under certain circumstances. The question arises, is that a promise within the provision of the Statute of Frauds concerning the debt, default or miscarriage OF ANOTHER? If there are funds in the drawee's hands belonging to the drawer, that question can hardly arise, because the drawee then simply pays his own debt - he is not paying the debt of another. But the answer to the question might be different if as a matter of fact the drawee owed nothing to the drawer and still accepted the bill orally. Then of course he would be promising orally to pay the debt of another, and that promise by the statute of frauds is not good.

(3) Quasi acceptance in the third place is BY CONDUCT. The statute provides that the drawee may retain a bill 24 hours to determine whether he will accept it or not. The same was the rule under the general law merchant. If he retains it longer, unless his retention be explained, he is regarded as accepting the bill - by conduct. He also may accept it by his conduct if he DESTROYS THE BILL, unless he offers some explanation of the destruction.

(4) Fourthly, quasi acceptance may be FOR HONOR. That acceptance for honor is in this country a creation of the Negotiable Instruments Law. The law merchant as administered here had very little, if anything, to do with it; it was an English custom, and the Negotiable Instruments Law in recognizing it simply followed the Bills of Exchange Act. It occurs where, after the drawee has refused to accept the bill, one accepts it for the 'honor of the drawee' in order to preserve his credit.

(5) VIRTUAL ACCEPTANCE: that means those acts which are equivalent to a formal acceptance of the bill. Acceptance proper binds whether the bill was taken on the faith of the acceptance or not. And the acceptance is good to the holder tho not made until after the particular holder became the owner of the bill. It is enough that the holder is a holder in due course, and it makes no difference whether there was any consideration between him and the acceptor or between the acceptor and the drawer.

ALL THIS IS THE EXPRESS CONTRACT OF THE ACCEPTOR:

he agrees to pay

the bill. That contract is expressed by the use of a single word or by the name of the drawee. Now THERE IS AN IMPLIED CONTRACT on the part of the acceptor. He ADMITS SOME THINGS, and these are the things that he admits: He admits the EXISTENCE OF THE DRAWER. If the drawer is a fictitious person, that does not excuse the acceptor. He admits the GENUINENESS OF THE DRAWER'S SIGNATURE; so he cannot be heard to say that it was forged. He admits the CAPACITY AND AUTHORITY OF THE DRAWER to draw the bill: he cannot be heard to say that he was an infant or an insane person, &c. He admits the AUTHORITY of the drawer to draw the bill. He admits the EXISTENCE OF THE PAYEE and his THEN CAPACITY TO INDORSE. ACCEPTANCE ONCE GIVEN CANNOT BE WITHDRAWN nor revoked. WITH REFERENCE TO CERTIFICATION OF CHECKS the rule has been held to be different. The certifying of a check is sometimes spoken of as the acceptance of a check. In a measure it IS acceptance, but it is RATHER a warranty - an assumption of somebody else's debt.

THE ACCEPTANCE MUST BE IN WRITING (unless it be a quasi acceptance) and, according to the statute, it must be signed by the drawee. Under the general law it was held in many of the cases that any word indicating that the party had seen the bill and recognized the obligation on it, was sufficient; but the statute requires that it must be SIGNED by the drawee.

WHERE THE DRAWER INDICATES ON THE BILL THAT APPLICATION may be made to another person in case the drawee refuses to accept, that other person is called an ACCEPTOR IN CASE OF NEED. Now if the drawee refuses to accept the party who takes the bill is not OBLIGED TO RESORT TO THIS SAFETY-VALVE of the drawer's; he can call the bill dishonored as soon as the drawee refuses to accept, and act accordingly.

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-- November 13, 1902.

LECTURE VI

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'CHECK' MEANS

to stop, and that is really the meaning of a check as used in commercial transactions: it stops the transaction: it makes payment on it. In the law merchant a check is DEFINED BY MR DANIEL thus: 'A check is (1) a draft or order, (2) upon a bank or banking house, (3) purporting to be drawn upon a deposit of funds, (4) for the payment at all events of a certain sum of money (5) to a certain person therein named, or to him or his order, or to bearer, and (6) payable instantly on demand.'

Dan. Neg. Instruments, Sec 1566

Another definition is, 'A check is a bill of exchange drawn on a banker, payable on demand.'

Randolph on Comm. Paper, Sec 8

Other definitions do not differ substantially from these two. BY STATUTE - by the Bills of Exchange Act and by the Negotiable Instruments Law - a check is defined as a bill of exchange drawn on a bank, payable on demand. Let us analyze Mr Daniel's definition:

(1) A CHECK IS A DRAFT OR ORDER. So is a bill. One is a draft or order upon a BANKER; the other is a draft or order upon ANYBODY who may be the debtor of the drawer or who may be willing to honor his draft. It is not proper to describe a check as necessarily an inland bill of exchange, because checks may be used to pay on account of transactions entirely foreign.

(2) It is ABSOLUTELY NECESSARY THAT THE DRAFT, to be a check, should be DRAWN UPON A BANK OR BANKER. That is where it differs from one respect from a bill. There is a disagreement, perhaps, as to whether the fact that the drawee is a bank or banker should be disclosed by the instrument itself or whether parol proof of that fact may be resorted to. The UNDOUBTED WEIGHT OF AUTHORITY is that it is all right to draw the check upon 'Smith & Jones' and then leave it to parol to determine whether S & J are bankers. The way the banking business is carried on now, however, the check will almost always disclose that it is drawn upon a bank or banker. In England it would be different, because individuals do banking business under their individual names a great deal more than they do here. Mr Daniel's opinion is that it would be better to require the check to show on its face that the drawee is a bank or banker.

(3) The draft, in order to be a check, MUST PURPORT TO BE DRAWN UPON A FUND or upon a deposit. The true criterion however is not that the order is actually drawn on a deposit, but that it PURPORTS to be so drawn. If there were no deposit it would be a fraudulent check, but a check nevertheless.

(4) It must be for the PAYMENT AT ALL EVENTS OF A CER-

TAIN SUM OF MONEY. The same is true of all other negotiable instruments.

(5) AS TO WHOM PAYABLE: it may be payable to a certain person, to a certain person or his order, to a certain person or bearer, or to bearer, to the 'order of bills payable', to the order of a certain fund, or any other arbitrary design or contrivance. In these latter cases however the ... is construed to be payable to bearer. A check payable to bearer needs some special attention. It is said by Mr Daniel to have been the custom in England, prior to the enactment of the statute called the 16th and 17th Victoria, for checks to be payable to bearer. I doubt if that statement is correct. Another authority say that there was a stamp ... tax on checks payable to order, and in order to avoid that stamp tax checks were frequently made payable to bearer. But however that may be, it has been the policy of the English courts and of the English parliament to make it easy for bankers to pay checks so that they would not be responsible for the title: not responsible, in other words, if they happened to pay them to the wrong party. The statute to which I have referred, the 16th and 17th Victoria, provided that checks should be made payable to order, and further provided that 'Any draft or order drawn upon a bank for a sum of money payable to order on demand, which, when presented for payment, shall purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such bank to pay the amount of such draft or order to the bearer thereof, and it shall not be incumbent on such banker to prove that such indorsement or any subsequent indorsement was made by or under direction or authority of the person to whom the said draft or order was or is made payable, either by the drawer or any indorser thereof.' The purpose of this statute was to protect bankers against forged indorsements.

An INDORSEMENT ON A CHECK PAYABLE TO ORDER, purporting to be signed by the payee by agent, has been held to come within the provisions of this act.

Charles v Blackwell, 2 C. P. Div. 151 (1877);
S C Hoak's Eng. Reps. 426

It is very easy for a man from this country to take a check or a letter of credit into a bank in England and get the money on it. They ask hardly any questions; they are protected by this statute, and by their customs, in so doing. It is the POLICY OF THE LAW IN ENGLAND TO PROTECT THE BANKER. That policy has led to what is called

CROSSING CHECKS

Draw an ordinary check and draw transversely across that check (or in any direction across the face of it) two parallel lined about 3/4 of an inch apart. Now that is called a CROSSED CHECK; that is called a GENERAL CROSSING. Another form of crossing is by writing in between those lines the words 'AND COMPANY' or any abbreviation of it. Now take

another check and draw two parallel lines across it and write between them the name of an individual banker or banking house. That is an illustration of SPECIAL CROSSING. That check cannot be paid anywhere except through those particular bankers.
THE OBJECT OF CROSSING
is entirely to protect the banker. In order to make a crossed check available to you, you have to have an account at the bank; that is, in the case of a check crossed generally, you can get it paid only through a bank at which you have an account. If it be CROSSED SPECIALLY - crossed to a special banker - then you can get that check cashed only at the bank to which it is crossed specially.

Now to my crossing, whether general or special, may be ADDED THE WORDS 'NOT NEGOTIABLE.' That seems to be a contradiction in terms, inasmuch as the check is payable to order in the first place. That however does not mean that the check cannot be negotiated, but it does mean that the check cannot be negotiated with the full rights: a person cannot get better rights in it than the holder or a transferrer has. The transferee has then only the rights that the transferrer had; the indorsee is in the indorser's shoes.

NOW WE HAVE NOTHING OF THIS SORT IN THIS COUNTRY, but checks of that kind frequently come over here from England and get into small places; hence it is well enough to know something about this matter.

(6) A check must be PAYABLE INSTANTLY AND ON DEMAND.

There is no time on a check. Now this is the main difference between a check and a bill. A bill is designed to run, and it may pass through 50 hands before it reaches the drawee, and it may be traveling the entire time, and still be good. A check cannot do that. And though the check is defined by the statute as a bill of exchange drawn upon a banker and payable immediately, it is not in that respect a bill of exchange.
THE UNDERTAKING BETWEEN A BANKER AND HIS DEPOSITOR
is that the banker will pay out the depositor's funds on his order, and his order comes in the shape of checks. Now when the holder gets a check he MUST PRESENT IT WITHIN A REASONABLE TIME or run the risk of losing the amount of the check and perhaps incurring liabilities greater than he ordinarily assumes. Under ordinary circumstances when you give a man acheck, if he holds that that check so long that it becomes worthless, then the loss is not yours. He must present it within a 'reasonable time' - that is the language of the law merchant. That 'reasonable time' is between the time of its receipt and the close of banking hours on the NEXT SUCCEEDING SECULAR DAY.

What I have said is true where the bank and the payee or holder of the check ARE IN THE SAME TOWN. If the banker and the holder are in DIFFERENT PLACES, then it is the duty of the holder to send the check in for collection WITHIN THE SAME TIME, so that it may reach its destination, if possible, at as early

a time as it would had the bank been in the town where the payee is: he must put it in course of collection before the close of banking hours on the following secular day. The statute does not change the law merchant in that regard.

THE ALLOWANCE OF A DAY DOES NOT EXTEND TO AN AGENT who receives the check for his principal: He must present it instanter.

Smith v. Miller, 43 N. Y. 171

The holder has that allowance of time IF HE CHOOSES TO TAKE IT and he may take it without suffering personal liability; but if he presents that check on the same day and the bank declares it willingness to pay and offers to pay, he cannot then have extra time, because he has then exercised his option.

WHEN THEN IS THE DRAWER DISCHARGED?

He is discharged if the check is not presented within this reasonable time and if he has thereby suffered loss. The indorser AND ASSIGNEES DO NOT HAVE THE SAME TIME after the receipt of the check by them as an indorser does in the case of a bill or note, because he can see from the face of it that he has a stale check, and it was the holder's right that, into whosesoever hands that check fell, it should be presented within a reasonable time.

The DRAWER OF A CHECK AND THE DRAWER OF A BILL DIFFER IN this respect: The drawer of a bill, if the steps have not been taken to establish his liability, is discharged absolutely, whether as a matter of fact he has suffered any loss or not; while the drawer of a check is not discharged although these rules be violated, provided there be presentment within a reasonable time. This liability of the drawer ARISES OF COURSE ONLY WHERE THE BANK HAS SUSPENDED: that is the only condition of things where the drawer could suffer loss.

Take the case WHERE THE BANK HAS SUSPENDED: if by that act, following a failure to present within a reasonable time, the drawer has suffered loss, then whatever loss he has suffered he may recover, or, in other words, he is discharged to that extent.

Take the case of the SUSPENDED BANK WHICH SUBSEQUENTLY PAYS IN FULL: there of course the drawer has suffered nothing, and consequently he is not discharged.

Take the case where the bank fails but BEFORE THE FAILURE THE DRAWER OF THE CHECK WITHDREW ALL HIS FUNDS: he is not discharged, because he had nothing to lose by the failure.

Take the case where the bank suspends, does not pay the check but SUBSEQUENTLY PAYS say 50% on the DOLLAR: in that event the drawer is discharged to the extent of 50%.

WHERE THE BANK PAYS NOTHING the payee of course, must suffer the loss as between him and the drawer.

THE PARTIES TO A CHECK ARE

the drawer, the drawee (which is a bank),

the payee and the certifier. The certifier is the only one of these who need be specially mentioned. He is a third party to a negotiable instrument of primary liability.

HOW IS A CHECK CERTIFIED?

If a bank certifies a check it becomes the primary debtor and it must pay, whether or no. The bank charges that up to the drawer's account and credits the amount of it to what is called a 'certifying account.' The account of the man who draws that check is lessened by just so much money as that check represents. Now that certified check runs as a piece of money would run: it goes anywhere and everywhere. When it is presented however it is GOOD IF THE BANK IS GOOD, and when it is paid it is charged up to that certifying account. You can see that this is equivalent to taking the amount of the certified check out of the drawer's deposit and issuing a certificate of deposit payable to bearer.

Checks are CERTIFIED FOR THE PURPOSE OF greater security and for the purpose of holding them from presentment for a while. It is the object of the certified check to run a short ways. It CANNOT STAY OUT AND BE ABSOLUTELY GOOD LONGER than a reasonable time. WHEN THE HOLDER GETS THE CHECK CERTIFIED he sustains the loss if the bank does not pay it; when the DRAWER GETS THE CHECK CERTIFIED he will sustain the loss if the bank fails and does not pay it.

Minot v Roth, in the text.

THE THEORY OF THAT IS THIS: if the drawer of the check has it certified, then so far as he is concerned it is paid right off. Again: it is the duty of the HOLDER of the ordinary check to present it and get the money on it: if instead of doing that he sees fit to have it certified, and then the bank fails before payment, the loss is his.

CERTIFICATION IS THE VOLUNTARY ACT OF THE BANK: you cannot compel a check to be certified.

The failure to accept a bill dishonors it immediately; it DOES NOT DISHONOR A CHECK TO REFUSE TO CERTIFY IT. Where a check is drawn on a bank, the effect of certification is to accept it.

WHO MAY CERTIFY A CHECK?

The teller is the financial officer of the bank, and I think has the right to certify it, tho there is some authority the other way. Of course the president and cashier are proper officers to certify. The U. S. statutes relating to national banks make it a misdemeanor for any employe of a bank to certify a check unless the funds are there.

THE EFFECT OF CERTIFICATION on the drawee is to make him an absolute debtor; an indorser is discharged if the holder procures certification, because he is in effect a new drawee.

IN ONE CASE, and in one only, the DRAWER OF A BILL OF EXCHANGE IS A PARTY OF PRIMARY LIABILITY. That is when he draws fraudulently: draws without any funds in the hands of the drawee or without any reasonable assurance that in the absence of funds the drawee will accept the draft.

-- Nov. 20, 1902.

LECTURE VII

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(FROM DICTATION)

I have spoken of the parties who are primarily liable on negotiable instruments. They are the maker, the acceptor, the certifier. Other parties to negotiable instruments are secondarily liable, namely, the drawer and indorser.

(I) PECULIARITIES OF DRAWER'S CONTRACT.

It is natural perhaps that the drawer is spoken of as a party of primary liability. This is a mistake. The mistake arises out of the fact that the drawer is regarded as the creator of the instrument, the same as the maker, and therefore his liability is mistakenly presumed to be the same as that of the maker.

(1) The contract of the maker and that of the drawer are unlike in form and effect. (a) IN FORM the maker promises to pay. (b) IN FORM the drawer orders somebody else to pay. (c) IN EFFECT the maker makes an absolute promise. (d) IN EFFECT the drawer makes a conditional promise.

(2) The contract of the maker and that of the drawer are alike in effect; i. e., the drawer is a party of primary liability (a) when he draws fraudulently, (b) when he draws on himself, (c) when drawee is a fictitious person or a person not having capacity to contract.

(a) DRAWING IN FRAUD. (a1) Presumption that when one draws he has something to draw upon. (a2) If he has nothing to draw upon, his drawing is prima facie fraudulent. And plaintiff suing the drawer as a party of primary liability would make his prima facie case by showing that the drawer drew without funds in the hands of the drawee; but the presumption of fraudulent drawing, and therefore of primary liability, could be rebutted by the drawee's showing that he had reasonable expectations that his draft would be honored notwithstanding he had no funds with the drawee. (a3) REASONABLE GROUNDS FOR DRAWING: (1) Assurance from the drawer that his draft would be honored; altho the drawee had no funds in his hands he might notify the drawer in advance that he would honor the drawer's draft. In such a case reasonable grounds for drawing would exist. (2) A course of dealing giving the drawer reasonable assurance that his draft would be honored. Relations might exist between the drawer and the drawee thru which the drawee, by reason of previous dealings, would be expected to honor the drawer's draft. In such a case the drawing would not be fraudulent.

(3) FRAUD IN DRAWING IS NOT TO BE PRESUMED, nor its existence to be established by slight circumstances. On the contrary, it must be clearly proved. One is not to be lightly deemed guilty of fraud. This is a general rule. Fraud is not to be presumed; it must be proved. There is no exception to the general rule in the case of drawing a bill.

(4) THE REASONABLE GROUND FOR DRAWING MAY RELATE either to the time of drawing or to the time of presentment: (a) FUNDS AT THE TIME OF DRAWING: If the drawer had funds in the hands of the drawee at the time of drawing, or if funds were on the way, the drawer is liable as a primary party if he withdrew or intercepted them before presentment to the drawee. (b) FUNDS AT THE TIME OF PRESENTMENT BUT NOT at the time of drawing: This state of facts makes the drawer only secondarily liable. He is entitled to notice of dishonor before his liability attaches.

(5) WHAT AMOUNTS TO REASONABLE GROUND? (a) A reasonable ground of drawing is not to be established from the fact that the drawer entertained some idle hope that the bill would be accepted or that there was a remote possibility of such a result. (b) There must be reasonable expectation that his draft will be honored; such an expectation as an ordinarily prudent business man, who had due regard to his commercial credit, would entertain.

So it is that IF ONE DRAWS WITHOUT REASONABLE GROUNDS he is liable without notice. He is a party of primary liability, like the maker.

Robinson v Ames, 20 Johns. 146
Wood v Price, 46 Ill 435

HOW THE INDORSER OF A FRAUDULENTLY DRAWN BILL IS AFFECTED BY THE FRAUD OF THE DRAWER.

The indorser cannot be held to a liability without the steps being taken to fix that liability. Those steps have been frequently mentioned and need not be repeated. There seems to be no reason why the liability of the indorser should be affected by fraudulent drawing.

ACCEPTANCE: HOW AFFECTS REASONABLE GROUND.

The fact that a fraudulently drawn bill has been accepted, does not seem to have any effect upon the fact of fraudulent drawing.

II Daniel's Neg. Instr., Sec 1082

(b) WHEN THE DRAWER DRAWS ON HIMSELF.

(b1) In such a case, the drawee being identical with the drawer is in honor bound to accept. The Statute provides that the drawer 'engages that on due presentment the instrument will be accepted and paid, or both, according to its tenor.' And again: 'When the drawer and the drawee are the same person, no notice is required.' This is a declaration of the general law.

(b2) In such a case the drawer may be treated as the maker of a promissory note.

Fairchild v O. R. R. Co., 15 N Y 337
Miller v Thompson, 3 Mann & G. 576

The same is true where A CORPORATION OR A PARTNERSHIP draws upon itself, or where one draws upon a partnership of which he is a member. (Illustrations.) The Statute provides that in such a case the holder may treat the instrument as a bill of

exchange or a promissory note, at his option.

(b3) WHERE DRAWEE IS A FICTITIOUS PERSON, or a person not having capacity to contract. It is manifest that such a state of facts must operate to make the drawer a party of primary liability. His engagement is that the drawee shall accept the draft and pay it. If such drawee be a fictitious person or a person without capacity to contract, the engagement cannot be fulfilled and the result is that the drawer is primarily liable.

II. WITH EXCEPTIONS BEFORE STATED, DRAWER IS A PARTY OF PRIMARY LIABILITY.

(1) Contract of the drawer and indorser compared: (a) points of identity; (b) points of similarity; (c) points of dissimilarity.

(a) POINTS OF IDENTITY. Perhaps in no respect are the rights and obligationf of the drawer and indorser exactly identical. They are similar, but not precisely the same.

(b) POINTS OF SIMILARITY. The contract of the indorser and drawer are similar in form. Indorsement, particularly a special indorsement, is similar to the drawing of a new bill. (Illustrations by giving form of a bill and form of a special indorsement, showing points of similarity in the forms.)

(c) POINTS OF DISSIMILARITY. (1) The drawer is supposed to draw on funds; the indorser is not. (2) Acceptance is called for by the drawer; it is not called for by the indorser. (2a) Drawer is entitled to have bill presented for acceptance, except it be a bill payable on demand or, by statute, at sight. An instrument is payable on demand where it is 'expressed to be payable on demand or at sight or on presentation.' By the law merchant there are some distinctions between instruments payable on demand and those payable at sight, as for example in the matter of days of grace.

Daniel's Neg. Instr., Sec 617-619

The NIL abolishes these distinctions. The better doctrine of the law merchant is to the effect that the drawer's contract looks, in all cases in which the bill is not payable on demand, to the acceptance. The drawer is understood to engage that the holder shall have a special security of acceptance. Drawer's contract may be broken by refusal of the drawee to accept, and his liability may be fixed. (Illustration: Bill dated Sept. 1, 1902, payable three months after date. Presented for acceptance Sept. 2, 1902. Acceptance refused. Paper thereupon protested and drawer notified. Drawer's liability attaches thereupon. Holder may sue him at once. Need not wait for maturity of bill.)

If presentment for acceptance is made IN CASES WHERE IT IS NOT REQUIRED, refusal to accept will make it necessary for the holder to take the steps essential to fix liability upon the secondary party. Omission to take the steps in such a case will be on pain of discharging the drawer. This is the general rule. In Pennsylvania there seems to be an exception to this general rule, the court in that state holding that if

presentment is unnecessary the act of presenting is regarded as nugatory.

House v Adams, 48 Pa St 261

CASES IN WHICH PRESENTMENT MUST BE MADE:

(1) Where bill is payable after sight, or in any other case where presentment is necessary to fix the maturity of the instrument. (2) Where the bill expressly stipulates for such presentment. (3) Where a bill is drawn payable elsewhere than at the residence or place of business of the drawee. In no other case is presentment for acceptance necessary in order to render any party to the bill liable.

NIL, Sec 240

This is a DECLARATION OF THE GENERAL LAW, except that bills drawn payable at sight were entitled to grace. So presentment was necessary to fix the maturity of the instrument. Where bank receives a bill for collection it is its duty to present for acceptance at once so as to get the security of the drawee.

Allen v Snyder, 17 Wend 368

EFFECT OF FAILURE TO PRESENT SUCH BILLS

as are required to be presented: (a) Unless bill is presented or negotiated within a reasonable time, drawer and all indorsers are discharged.

TIME IN WHICH PRESENTMENT SHOULD BE MADE:

(a) Before bill is overdue. (b) A reasonable hour on a business day. Illustrations: presenting in country districts and in cities compared. (c) At any time when negotiable instrument may be presented for payment.

TO WHOM PRESENTMENT MUST BE MADE. (a) To drawee or someone authorized to accept or refuse; (b) to one of partners; (c) to all of several drawees, unless one or more authorized to accept or refuse; (d) to drawee's personal representatives when drawee is dead; (3) to drawee himself or his trustee or assignee when drawee has been adjudged bankrupt or insolvent.

WHEN BILL IS DISHONORED BY NON-ACCEPTANCE: (a) When such acceptance as is proper is refused; (b) When presentment for acceptance is excused and the bill is not accepted.

WHAT TO BE DONE IF ACCEPTANCE IS REFUSED:

Person presenting it must treat the bill as dishonored if he would have recourse against drawer and indorsers.

IF BILL IS DISHONORED BY NON-ACCEPTANCE, immediate recourse may be had against drawer and indorsers. Not then necessary to present for payment.

III.

DRAWER OF CHECK COMPARED WITH DRAWER OF BILL:

(1) Check always supposed to be drawn on funds; bill upon funds or credit with drawee, or reasonable grounds of expectation that draft will be honored.

(2) Check drawn on banker; bill on trader or other person.

(3) Check is drawn for payment; bill ordinarily for credit.

(4) Drawer of a check is discharged to extent of damages.

Drawer of bill discharged tho not damnified.

(5) Check kept out only for a limited time.

Bill kept out for extended period, provided it is negotiated within reasonable time; in other words, kept moving.

— oOo —

December 12, 1902.

LECTURE VIII

— ooo —

CONTRACT OF THE INDORSER.

Whatever is to be said concerning the contract of the indorser will apply as well to the contract of the drawer, barring the exceptions heretofore named.

FORM OF THE INDORSER'S CONTRACT AND, PRIOR TO THAT, AS TO THE MEANING. 'Indorse' means on the back - putting one's name on the back of an instrument. It is not necessary as a matter of law that the name should be on the BACK, but it is the ordinary way and it is the form in which the contract is made. And the contract of the indorser is made, so far as form is concerned, by the simple writing of one's name, if he be a party connected with the instrument as payee, drawer or indorser. When he writes his name on the back the law makes the contract. And the mere act of writing the name on the back makes as complete a contract in law as if the exact phraseology in which that contract might be expressed, were expressed over the signature.

WHO MAY INDORSE a negotiable instrument? Anybody if he desires by that act to add security to the instrument. A stranger to the instrument who puts his name upon the back of it is, under the NIL, an indorser.

WHO MUST INDORSE? Anybody must indorse in whom the title stands, in order to pass that title from him and to give his transferee the right to bring suit on the instrument. In other words, he must indorse whose indrosement is necessary to transfer the title.

THE ELEMENTS WHICH ENTER INTO THE CONTRACT OF INDORSEMENT and come from the mere act of the party's writing his name across the paper, are: (1) the transfer of the title, and (2) payment upon the performance of conditions precedent. That is the contract of the indorser - he engages to do those two things.

THE SIMPLEST FORM OF INDORSEMENT is where there is one payee and he indorses - in blank or specially - and thereby directs payment to be made to some special person or his order. Let us then call that the 'typical form' or the 'simplest form' and see what departures are found in actual transactions from it.

(1) IF PAPER IS PAYABLE TO A TRUSTEE, the trustee must indorse himself, because in him stands the legal title.

(2) Where the paper is made PAYABLE TO A, TO OR BY THE ORDER of B. The one on whose order it is directed to be paid, is the one who should indorse.

(3) WHERE THE HOLDER HAS DIED. Who must indorse in that case? Manifestly the one who is his successor in the legal title - the executor or administrator of the estate. This is so even where the instrument was specifically devised.

(4) WHERE AN INSTRUMENT IS MADE PAYABLE TO PARTNERS - who must indorse? The partnership must indorse. That act can be accomplished by one of the partners, because of his general agency; but it must be done in the name of the partnership. One partner cannot indorse the paper, even to his co-partner,

so as to enable the copartner to bring suit upon it.

Ala. Coal Min. Co v Brainerd, 35 Ala 476; HNIL 273

If paper is made payable to A, B and C, they being partners, B and C cannot indorse that paper payable to A so as to enable A to bring suit upon it. THE REASON IS: The legal title was in the partnership, not in A, B and C, and therefore that legal title cannot be transfered without the indorsement of the firm. The firm can indorse in its firm name and make it payable to one of the partners, and in that case the partner can sue any of the parties to the instrument except the copartners.

SURVIVORS OF A PARTNERSHIP may indorse. There is some doubt expressed about the rule - about survivors being able to indorse where a firm has been dissolved, not by death but by operation of law.

Abel v Sutton, 3 Esp. 108

Faulks v Pouri, 2 De Sau's Eq. 40

(5) WHERE THE INSTRUMENT IS PAYABLE TO TWO OR MORE WHO ARE NOT PARTNERS, all should indorse unless one or more have authority from the others.

Dwight v Pease, 3 McLean 94, 8 Fed Cas 196, HNIL 371

(6) WHERE THE PAPER IS PAYABLE TO A CASHIER. That is a very ordinary way of making it payable at bank. Here the cashier may indorse, so also may the corporation of which he is cashier. The NIL has enlarged the scope of the fiscal officers of a corporation indorsing in behalf of the corporation, by extending it from cashier - which was the rule under the law merchant - to any fiscal officer of a corporation.

Sec. 72 of the NIL

Folger v Chase, 18 Pick 63; HNIL 349

AN INDORSEMENT IS NECESSARY

(1) When the INSTRUMENT IS PAYABLE TO ORDER. (2) When such instrument is INDORSED SPECIALLY. (3) In all cases where transfer of the title is necessary to be evidenced by some personal act.

INDORSEMENT IS NOT NECESSARY

(1) When the instrument is PAYABLE TO BEARER, and then it is not necessary even tho such an instrument be indorsed specially thereafter.

Rider v Tayntor, 4 Allen 356; HNIL 368

IRREGULAR INDORSEMENTS.

Now the regular indorsement is the indorsement of which I have spoken - the mere writing of one's name across the negotiable instrument. A departure from that is an irregular indorsement. The indorser's contract is an executed contract the moment he signs his name - executed so far as the transfer of the title is concerned. In this regular form of indorsement, aside from transferring the title the indorser undertakes to pay the instrument.

A CONTRACT OF SUCH TENOR MAY BE WRITTEN above the name of the indorser who signs his name simply. You add nothing to an instrument - you take nothing away from it - by writing above the signature of the indorser a full expression of this contract to which I have alluded.

AN IRREGULAR INDORSEMENT OCCURS WHERE the indorsee or some other person writes over the name a contract of a different character. 'I this day sold and delivered the within note to John Doe.' 'I hereby sell all my right, and title, to this note.' Authorities holding this equivalent to an indorsement:

Adams v Blethen, 66 Me 19
Markey v Corey, 108 Mich 134; HNIL 343
Contra: Spencer v Halpurn, 62 Ark 595; 36 LRA 120
See: Hall v Tobey, 110 Pa St 318; HNIL 345

Similar expressions to those quoted are found in a multitude of cases. The notes to Markey v Corey, supra, will be found particularly valuable as a digest in aid of detailed study of the subject.

On the whole it may be said that numerous cases hold such expressions to amount only to an indrosement, while other valuable authorities hold to Spencer v Howard.

A MORE RADICAL DEPARTURE IS FOUND IN such expressions as 'I hereby guarantee the payment of this note.' Here you see the party to the instrument has departed from the usual lines. This has been treated as an indrosement.

Partridge v Davis, 20 Vt 499
Trust Co v Nat Bank, 101 U S 68; HNIL 346

In this latter case the Supreme Court of the United States held such an expression to be a guaranty pure and simple, and not an indorsement. Where the writing was 'Pay the Elgin City Banking Co. and payment guaranteed', it was held an indorsement.

E. C. Bank. Co v Zelch, 57 Minne. 487; HNIL 347

INDORSEMENT CONTRASTED WITH SALE OR ASSIGNMENT.

The liabilities of the parties who enter into those contracts are very different. Those who enter into a contract of sale or assignment enter into a contract of the common law; those who enter into a contract of indorsement enter into a contract governed by the law merchant. Whether the contract is one or the other, is a matter of construction where the typical form is departed from.

HERE IS ANOTHER DEPARTURE FROM THE TYPICAL FORM - one which involves construction as to the intent of the party: Above the signature of the party was written: 'Received one year's interest on the within. May 10, 1872.' This imports not an indorsement but a receipt for payment.

Clark v Wing, 45 Conn 149

You would hardly think a controversy COULD arise here.

Your statute gives you the different kinds of indorsement. I need not dwell upon them at any length. I will simply run over the KINDS OF INDORSEMENT: (1) Special; (2) In Blank; (3) Restrictive; (4) Qualified; (5) Conditional. The statute which you have already had, describes those fully.

THE INDORSEMENT MUST BE FOR THE ENTIRE INSTRUMENT. It cannot be divided. The statute provides that and in that respect it follows the general law.

Hughes v Kiddell, 2 Bay (S. C.) 324; HNIL 350

AND THE HOLDER MAY SUE ANY OF THE PARTIES whose liability has been fixed, and in any order he pleases.

IF MAKERS OR INDORSERS INCUR A JOINT LIABILITY they cannot be separated. They must be sued together.

Lane v Stacey, 8 Allen 41; HNIL 465

PARTNERS MUST BE JOINED in a suit.

Section 118 of the Statute

makes a change in the law merchant.

BETWEEN INDORSERS THEMSELVES the liability runs backward, never the other way. PRESUMPTIVELY THE ORDER OF THE NAMES ON THE PAPER is the order of time in which the parties indorsed. This presumption may be rebutted.

Now it is a matter of construction whether the modified form of contract STILL REMAINS A CONTRACT OF INDORSEMENT or whether too much or too little has been said and so it has been turned into a contract of sale or a contract of assignment.

THE IMPLIED CONTRACT OF THE INDORSER,

or the incidents of the indorser's contract:

I have already told you what the express contract of the indorser is. The implied contract of the indorser, or the warranties of the indorser, are these: (1) That the instrument is in every respect and as to all prior parties, genuine, and is not forged, fictitious or altered; (2) That the instrument is a valid and subsisting obligation and that the contract obligations of all prior parties are valid; (3) That the prior parties were competent to bind themselves, whether as drawer, acceptor, maker or indorser; (4) That he as indorser has good title to the instrument and the right to transfer it.

THE INDORSER IS LIABLE ON HIS IMPLIED CONTRACT or his warranty if payment is refused or the instrument is successfully defended by any prior party, (1) because the instrument is forged; (2) because it has been altered in a material way; (3) because it is void for usury or any other reason; (4) because the parties were infants, or otherwise incompetent; (5) because the instrument was stolen.

THE INDORSER IS PRECLUDED FROM SUCH DEFENSES because of his implied agreements - in other words, his warranties.

CASES TO ILLUSTRATE WARRANTIES:

(1) Forgery: Wms. v T. Sav. Inst., 57 Miss 633; HNIL 468

(2) Incompetents: Irwin v Downs, 15 N Y 575; HNIL 468

THE STATUTE MAKES THE WARRANTY NEGOTIABLE.

THE QUALIFIED INDORSER

(or one who transfers by delivery) WARRANTS:

(1) That the instrument is in every respect, and as to all prior parties, genuine. That it is not forged, fictitious or altered. (3) That he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. (4) That all prior parties were competent to bind themselves.

-- ### -- (To be continued.)

LECTURE IX

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(Continued from Lecture VIII)
Authorities are not unanimous on this point. (5) That the instrument is a valid, subsisting obligation. Authorities divided. Under the NIL, this warranty not implied.

Section 115

The question arises: If an indorser cannot dispute these things when he himself is concerned, can he dispute them WHEN ANOTHER PARTY TO THE INSTRUMENT IS CONCERNED? In other words, in the language of the Bills of Exchange Act, 'he shall not be permitted to deny' certain things; in the language of the NIL, 'he warrants' certain things - he 'admits' certain things. Now can he be permitted to give testimony in a case which shall impeach that which he could not take advantage of when he is a party himself to the suit? The better holding is that he MAY GIVE THE TESTIMONY, that he is a competent witness to that effect.

— December 18, 1902.

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AN INDORSEMENT IN FORM MAY BE something more or less than an indorsement in fact. What is an apparent indorsement may not, as between the parties thereto and subsequent holders in like case, be a real indorsement. The point is illustrated by

Witherow v Slayback, 158 N Y 649 -

an excellent illustrative case, which should be consulted.

Some of several apparently several indorsers MAY BE SHOWN TO HAVE BEEN JOINT and must be sued jointly. This however cannot be done against a holder for value, without notice. It could be shown against a holder WITH notice, so as to require him to sue all together.

STEPS NECESSARY TO FIX INDORSER'S LIABILITY.

(I) The first step to be taken is to make presentment and demand. PRESENTMENT IS the exhibiting the paper to the party called upon to make acceptance or payment. DEMAND IS the act of requiring the drawee to comply with the order of the drawer or of the maker to perform his undertakings. These two elements are frequently spoken of as one; they are however distinctive elements. Both are required.

PRESENTMENT IS OF TWO KINDS: (1) for acceptance; (2) for payment. Generally speaking, bills must be presented for acceptance as requiring the time of payment to be fixed by that act. Independent of statute, bills drawn at sight must be presented so as to fix the time of payment. By the statute, bills payable on demand, at sight or on presentment are equivalents.

(2) PRESENTMENT FOR PAYMENT: All instruments must be presented for payment unless there is some equivalent or substitute

for actual presentment. Presentment is not required to charge the party primarily liable, unless there is an oral condition to that effect.

Harrisburg Trust Co v Shufelt, 72 Fed 292; HNIL 498
Montgomery v Eliot, 6 Ala 701; HNIL 499

It is required, (1) to enable the party called upon to judge of the genuineness of the paper; (2) to enable him to judge of the holder's right to the paper (for this purpose the person called upon may keep the paper for a short time; (3), where presentment is for payment, that on payment he may have possession of the paper as a voucher, or for any other useful purpose. The purpose of demand by or on behalf of the holder is to require the maker, drawee or acceptor to do what he has undertaken.

EQUIVALENT OF ACCEPTANCE AND DEMAND.

(1) There is no equivalent for demand where paper is not payable, on its face or by notice, at some bank. A sharp distinction is to be drawn between paper payable at a bank and paper not payable at a bank, in respect to presentment and demand. The requisites of presentment of paperpayable at a bank are that it shall be in the bank at maturity and with the knowledge of the bank. Both are essential.

Chicopee Bank v Phil. Bank, 8 Wall 641

The holder of paper very frequently deposits it in his own bank FOR COLLECTION. The practice is for such bank to notify payor. If paper is left in the bank until maturity, presentment is satisfied.

(II) PLACE OF PRESENTMENT.

The distinction between paper payable at a bank and paper not payable at a bank should be observed. Paper payable 'at bank' without particular bank being specified: Such paper is payable in any bank in the place of payment. Where the bank at which the paper is made payable has branches, it should be lodged in the proper branch. The drawee may name the place of payment within the city or town without changing the effect of the order of payment.

PAPER PAYABLE AT NO DESIGNATED PLACE is spoken of as paper payable 'generally.' The place of presentment of paper 'payable generally' is a matter of construction. The place may be determined by the address on the instrument. Place of business is preferred to place of residence. In case of removal of maker or acceptor from his place of business or residence, reasonable diligence must be shown on the part of the holder in making presentment.

HOLDER NOT OBLIGED TO MAKE PRESENTMENT WHEN party liable has removed from the state. When removed from the place of residence and not from state, diligence must be shown in presenting at new place of business or residence. The place of date is presumptively the place of presentment.

(III) TIME OF PRESENTMENT.

Distinction as to time between presentment for acceptance and presentment for payment.

(1) FOR ACCEPTANCE: When must be paid at or at a time

after sight, presentment may be made at any time before maturity in order to get the security of the drawee. Bills payable after sight should be presented within a reasonable time. This 'reasonable time' is interpreted to mean an indefinite time, limited only by the statute of limitations, provided the paper is kept in circulation. This is the requirement of the general law; the N I L makes presentment for acceptance of paper payable at sight unnecessary.

PAPER INDORSED AFTER MATURITY: This amounts to an order payable on demand.

Prior v Bowman, 38 Iowa 92.

(2) PRESENTMENT FOR PAYMENT must be made on the day of maturity and at a reasonable time and at a reasonable time of day. If day of maturity falls upon last day of grace, presentment should be made on the next preceding non-secular day. When the last day of grace falls upon a non-secular day, the period of grace is shortened.

INSTRUMENTS PAYABLE IN INSTALMENTS should be presented at the maturity of each installment.

RULE AS TO PRESENTMENT AT PARTICULAR TIME yields to obstacles making presentment impossible. These obstacles suspend the requirement that the duty should be performed at a certain day. When the obstacles are removed, duty revives. The obstacle must be a legal one. A legal obstacle is sometimes not attributable to the holder even by way of mistake. Omission to perform the duty will not be enough; there must be prevention - such a state of facts as will necessarily operate to prevent.

SOME INSTANCES OF LEGAL OBSTACLES:

(1) INEVITABLE ACCIDENT. This may include the mistake of another, but not the mistake of the party owing the duty.

W Bank v Norton, 22 Conn 213,

was an instance of where a legal obstacle arose from the mistake of the postal authorities in carrying the mail beyond the point of desitnation.

(2) WAR existing at maturity.

(3) EPIDEMIC existing at maturity, resulting in either a general quarantine or a quarantine limited to the district in which the paper was payable.

(4) WHERE THE MAKER OR ACCEPTOR IS DEAD. This may be a legal obstacle according to circumstances. Presentment in such a case should be made to the executor or administrator. If the one has not qualified or the other not been appointed at the maturity of the paper, the time for presentment is postponed. Generally, statutes provide that the estate shall be exempt from suits during a certain period. Under such circumstances no presentment is necessary, according to some authority; according to other, presentment IS necessary.

----oOo---- December 19, '02.

LECTURE X

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PRESENTMENT MUST BE MADE not only on the day of maturity, but at a reasonable time of the day.

IF THE PRESENTMENT BE MADE AT THE PLACE OF BUSINESS, it must be made within business hours; if at the place of residence, within hours not given over to rest. What are reasonable hours depends upon circumstances. Each case as to the reasonable time depends largely, if not wholly, upon its own circumstances.

WHO SHOULD MAKE PRESENTMENT? The holder or the one authorized to receive payment on his behalf should make presentment. The one who is entitled to payment and can give satisfaction therefor. No other than the true holder or his authorized agent can make presentment.

A party might defend by showing that whatever was intended as presentment was not made upon the proper day or, if it was, it was not made at the proper hour, or, if both these facts exist, it was not made by the proper person.

SUPPOSE THE HOLDER DIES - who should make the presentment in that instance? It should be made by the personal representative, that is by the executor or administrator. The widow or heirs of the deceased could not be authorized to make the presentment, altho they might be entitled to that particular piece of paper as beneficiaries. Intermediate parties may sometimes make presentment - i. e., these intermediate indorsers - but when they do so effectually it is as agents of the holder and not as intermediate parties.

Presentment may be made THRU THE MEDIUM OF THE POST OFFICE.

Prideaux v Cridell, L R 4 Q B 455

Hare v Heaty, 10 C B (N S) 65

DOUBLE PRESENTMENT. The holder may make presentment, and dishonor may follow. Then a notary in behalf of the holder, for the purpose of fixing the drawee's liability, may also make presentment. That is what we mean by 'double presentment.' It would be necessary that the notary , in order to make his protest, should first have the facts on which to base that protest, and it frequently occurs that a double presentment is made.

Some authorities are to the effect that the NOTARY CAN ACT ONLY IN PERSON; OTHERS, that he may act by deputy. Persons other than a notary public may act, and the statute prescribes that 'any respectable citizen' may act in that behalf.

TO WHOM SHOULD PRESENTMENT BE MADE?

N I L, Sec 132, Subd 4

When the party to whom presentment should be made IS DEAD, TO WHOM SHOULD THE PRESENTMENT BE MADE? Again, it should be made to his personal representative - to his executor or administrator. Perhaps presentment would be good if made under certain circumstances to a member of the family; and it is quite likely that under ordinary circumstances presentment would be excused entirely if no representative of the deceased were quali-

fied to receive the presentment or to reply to the demand.

When the party on whom demand should be made is a BANKRUPT OR INSOLVENT, that does not excuse presentment; presentment should be made just the same, and it should be made upon the bankrupt or insolvent himself, and possibly upon his trustee or assignee.

WHERE THE PRIMARY PARTY SIGNS AS AGENT, presentment should be made to him as such. And that rule holds good even tho at the time for making the present the agent has ceased to be the agent of the party. But if the agent in making the paper had disclosed his principal, perhaps presentment could be made to either.

When Presentment has to be made to two or more persons: IF THEY ARE JOINTLY LIABLE, it should be made to all of them unless they are partners or only one is authorized to receive presentment and to answer to the demand as the agent of the others. If their liability is to be SEVERAL INSTEAD OF JOINT, a presentment to one would be sufficient so far as he was concerned. But if the liability were joint and presentment were made to one it would not be sufficient so far as he is concerned.

PROTEST. When acceptance or paymont is refused upon due presentment and demand, the paper is said to be dishonored. Upon dishonor of the paper the second step toward fixing the indorser's liability must be taken. That second step is protest. What is protest? Protest is defined from its etymology to be 'bearing public witness of the fact.' In that regard it is used something like a deposition. Its object is to furnish evidence of the fact that the paper has been dishonored. Another interpretation of the term has been given, and that is 'bearing witness for', and in that sense it would mean a deposition for a person who was entitled to make a claim on account of the paper - in other words, for the holder.

WHEN IS PROTEST NECESSARY? It is necessary in the case of foreign bills. WHEN IS IT PERMISSIBLE? It is permissible in the case of all instruments, and in actual practice I think you will find that all paper which is dishonored is protested, particularly if it is lodged in the banks. The law merchant however does not know anything about protesting INLAND bills of exchange.

HOW IS PROTEST MANIFESTED? It is manifested by a formal certificate annexed to the instrument or a copy thereof, under seal of a notary. WHY SHOULD A NOTARY BE REQUIRED to perform this service? Simply because it is the result of custom, and when the matter came into practice in the first place the notary public was the most cosmopolitan, internationally, of officers. It is necessary that there should be sometimes a substitute for a notary; in that case a justice of the peace or other officer, and, as the statute prescribes, 'any respectable citizen,' may make the protest in the place of the notary.

NOW THIS PROTEST IS SIMPLY THE GIVING OF TESTIMONY; that is all there is to it; and in the case of inland bills it must stand or fall by itself - by its own strength or by its own weakness.

NO FORM OF PROTEST is prescribed either by the law merchant

or by the statute. But it will readily occur to anybody that the form should be such as to impress all the essentials; i. e., a recital of the several facts which go to show that the paper has been dishonored; a recital of those facts which involve presentment and demand, and which show refusal. Or it may show an equivalent for those things or a substitute for them, or that they were excused. If any of the steps were not taken the certificate should show why they were not taken. The protest should show the time and place of presentment and it should show the party to whom the presentment was made. Authority holding that the certificate need not show the person to whom the presentment was made, if the demand be made at the place designated for payment, is

Douglas v Bank, 97 Tennessee 133

IF PAPER IS PAYABLE AT A BANK THE PROTEST SHOULD SHOW that the presentment was made at the bank and not to the cashier or other fiscal officer of the bank. The cashier might have been met on the street - that would not be good presentment.

This protest goes to a foreign country or state, and must stand or fall by itself and of itself. In this respect it is like a deposition. Its deficiencies cannot be supplied by parol. OTHER EVIDENCE OF DISHONOR MAY BE PRODUCED if the bill was in fact presented and dishonored and protest was made, altho the CERTIFICATE of protest was lost.

THE GENUINENESS OF THE NOTARY'S SIGNATURE need not be proved. His seal proves that. Evidence may be received to prove that the seal was not genuine, and in that case the holder of the certificate would fail. The object of the certificate of protest is to furnish sufficient evidence of dishonor.

THE STATES OF THE UNION ARE FOREIGN TO EACH OTHER for the purposes of protest.

NOW AS TO INLAND BILLS, protest is not required by rule of law merchant. Protest of inland bills is a matter of statutory creation. The statute authorizes inland bills to be protested in some cases. IN ACTUAL PRACTICE EVERYTHING IS PROTESTED.

The difference between protest as to foreign bills and protest as to inland bills in respect to their weight as evidence is quite marked. There is not the same conclusiveness to the certificate of protest of an inland bill that there is to the certificate of protest of a foreign bill; nor is the latter subject to the same limitations.

'NOTING.' It may often happen that when the notary makes the presentment and demand for payment and the refusal is given, he has not the time then and there to make out this certificate of protest, but he takes down the observations, he notes down the points. That is called 'noting.' From that noting a certificate of protest may be made which will serve all the requirements of the law merchant, even tho the notary should die before he completed his certificate. There is no set time within which the certificate should be made out; THE NOTING SHOULD BE MADE AT THE TIME.

(III) NOTICE OF DISHONOR. This is required in every case.

Notice of dishonor must be given unless there is an equivalent for it or unless there is a substitute for it or unless some circumstances arise which furnish an excuse for it. Knowledge of dishonor is not sufficient. Knowledge may be sometimes used to supplement a defective notice, but knowledge that the paper has been dishonored does not avail.

Bank of Old Dominion v McVean, 29 Grat 549

FORM OF THE NOTICE. As in the case of protest, no set form of words is required. The substance is the essential thing to be observed. The notice may be written or oral. If it be written it may not be signed and still be good. If it is defective in any respect it may be supplemented orally within seasonable time.

COMPARED WITH PROTEST, the act of notifying is less formal; it is more simple, and the requirements of the law merchant concerning it are less exacting.

THE AUTHORITIES ARE NOT AGREED on just what is required in the matter of WHAT THE NOTICE SHALL CONTAIN. I will first call your attention to authority as agreed upon:

(1) THE INDORSER SHOULD BE NOTIFIED that the paper is dishonored. If the indorser is correctly informed what paper is dishonored, a mistake in the description of the paper or reference to the paper is immaterial. (a) Mistake as to DATE:

Mills v Bank, 11 Wheat 431; H N I L 534

(b) Mistake in setting out AMOUNT:

Bank of Alexandria v Swan, 9 Pet 33

The notice must be sufficient to apprise the indorser WITH REASONABLE CERTAINTY. Now if the notice standing by itself alone does not apprise him with reasonable certainty of the dishonor, any knowledge which he may have independent of the notice concerning it may be used to supplement that defective notice, and may add reasonable certainty to what otherwise would not have been reasonable certainty.

MATTERS WHICH ARE THE SUBJECT OF DISAGREEMENT: (1) Is it enough to notify the indorser that the note has not been paid and stop there? This arises mainly in the case of written notice. Where the notice was oral there is a great deal of latitude allowed for EXPLANATION. THE ENGLISH AUTHORITIES have treated that matter in three ways. They have made it pass thru three stages of development. They held, (1) The notice must expressly inform the indorser of everything that went to make up dishonor; i. e., must inform him so that he must understand. (2) They held that he must inform the indorser by certain implication, and (3) by REASONABLE INTENDMENT, which translated would mean 'by any fair construction he ought to understand it.' That is the result they have arrived at: the notice should be so complete as to inform the indorser by a reasonable construction.

AND SO THE BILLS OF EXCHANGE ACT HAS REQUIRED that the notice should say expressly, or show expressly, or by necessary implication or by reasonable intendment, that the paper had been dishonored. Merely saying that the paper was unapid would not be sufficient.

THE AMERICAN AUTHORITIES ON THE SUBJECT ARE DIVIDED INTO (1) federal and (2) state. Under the federal authority cited,

Mills v Bank, supra,

it seems to have been held by the federal authorities that notice which simply recited that the paper had not been paid was sufficient; but the state authorities have not regarded that as sufficient, and have announced the rule which I have already announced as being the latest of the English authorities - notice should be such as to inform the party of everything by reasonable intendment.

THE STATUTE PROVIDES that the notice is sufficient . . if 'indicate' that the instrument has been dishonored by nonacceptance or by nonpayment. Generally speaking, the notice must apprise the indorser that the holder looks to him for payment. Generally, the sending of the notice is a sufficient statement of that fact.

With these requisites in mind, ANYONE MAY MAKE A PROPER NOTICE OF DISHONOR without the form.

BY WHOM SHOULD NOTICE BE GIVEN? By the holder or his authorized agent; by an indorser legally bound to pay, and by nobody else except as the personal representative of a deceased holder, and even in that case that would be an authorized agent.

N I L, Sec 161,

provides that notice may be given by or on behalf of the holder or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, &c. The statute probably was not intended to change in any respect the general law. 'May' probably, in this connection, means 'must'.

AN UNAUTHORIZED STRANGER CANNOT GIVE A LEGAL NOTICE. Why? Because he cannot apprise the indorser that the holder will look to him for payment.

AN INDORSER WHO IS NOT A HOLDER MAY GIVE A VALID NOTICE.

Chapman v Keith, 2 A & E 193; HNIL 531

And a party WHO HAS NOT BEEN DISCHARGED BY LACHES and cannot in any event bring an action on the instrument, is a stranger for this purpose.

Harrison v Rusco, HNIL 531

THE STATUTE QUALIFIES THE RULE as expressed in Chapman v Keith, and provides that notice may be given by or on behalf of any party to the instrument who might be compelled to pay it to the holder and who on taking it up would have the right to reimbursement from the party to whom the notice is given.

INUREMENT. Suppose there are 5 indorsers of an instrument. The holder gives notice to the last indorser, he to the next last, and so on, until notice is given at the end of say seven days to the first indorsor. Now that notice to the first indorser INURES to the benefit of the holdor; so does the notice to the other indorsers, altho the holder himself could notify only the last indorser. Any of these parties whose liability is fixed, may give notice, and when he gives notice that is just as good for the holder as if the holder himself had given notice.

(To be Continued.)

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LECTURE XI

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(Continued from Lecture X)

None of these indorsers however can be held unless notice has been given - either by the holder or by somebody else - in proper time and in a proper way.

THE HOLDER IS NOT BOUND TO GIVE NOTICE TO anyone but his immediate indorser.

West River Bank v Taylor, 34 N Y 128
Lynn v Wharton, 17 Wisc 150, H N I L 550

-- Jan. 8, 1903.

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TO WHOM NOTICE MUST BE GIVEN. (a) To the indorser or his authorized agent.

Statute, Sec 168
Stuart v Eden, 2 Caines 121, H N I L 540

WHERE ONE ACTS AS AGENT IN INDORSING, notice should be given to him. In the case of JOINT INDORSERS, the notice should be given to each unless the relation of agency exists between them. Notice to part would not be sufficient to bind even those who are notified.

Jarnegan v Stratton, 97 Tennessee 619

The doctrine of joint contract of the common law is here recognized.

PARTNERS. Notice to one of them is notice to all.

IN CASE OF DEATH OF INDORSER, notice should be given to personal representative. Notice to one of two or more personal representatives is sufficient. In the event of not being able to serve notice on the personal representative of the deceased, notice to somebody interested in the estate may be requisite.

Notice to an EXECUTOR NOMINATED BUT NOT YET QUALIFIED is sufficient.

Notice to a person WHO AFTERWARD BECOMES ADMINISTRATOR is not sufficient.

Notice TO PERSONAL REPRESENTATIVE SHOULD BE ADDRESSED TO HIM BY NAME, not as 'executor' or 'administrator' ; tho notice addressed to 'executor' or 'administrator' has been held good if received in good time.

Smalley v Wright, 40 N J 471
Lindermann v Guldin, 34 Pa St 54
Dabney v Stidger, 12 Miss 749, H N I L 541

There is authority to the effect that notice should be also given to the PERSONAL REPRESENTATIVE OF DECEASED partner.

Cocker v Bank of Tennessee, 6 Humph 51
See Hobart v Matthews, 54 N Y 541
N I L, Sec 170

It is not clear that 'dissolution', as used in the statute, means dissolution by death.

WHERE PARTNERS GIVE A PROMISSORY NOTE with one of them as maker and the other as indorser, the other is not liable on his indorsement unless he be duly notified of the dishonor of the note.

Foland v Bank, 23 Pa St 476

INSOLVENCY OR BANKRUPTCY OF INDORSER. In such case notice may be given to party himself or his assignee or trustee. The rule as stated is supported by

Calhoun v Kentucky Bank, 82 Ky 231

American Nat'l Bank v Junk, 94 Tenn 634, H N I L 563

Opposed to the foregoing authorities in some respects is

House v Vinton, 43 O St 346,

wherein a distinction is made between an assignee under a voluntary general assignment and an assignee in bankruptcy.

HOW NOTICE SHOULD BE GIVEN. The indorser must be notified with reasonable dispatch. Therefore to insure notification with reasonable dispatch the manner of giving the notice becomes important.

(a) THE MORE DIRECT AND EXPEDITIOUS METHOD should be employed unless it can be shown that another method resulted in bringing notice home to the indorser just as soon as the presumptively more expeditious method.

(b) METHOD PREFERRED. The methods preferred have been changing with the progress of business and with enlarging means of communication and transportation.

(b1) Before the mails became so efficient and reliable, the method preferred was by PERSONAL NOTICE - face-to-face notice - or leaving written notice at the indorser's place of business. The mail was deemed a less expeditious method; so notice sent thru the mail was held insufficient unless actually received, and not then unless received as early as the latest day on which oral notice would have been sufficient.

Brown v Bank, 85 Va 95

Generally speaking, the unwritten law stands at this day as expressed above.

Boering v Harrison, 6 Howard 248

TO THE RULE ANNOUNCED THERE ARE THREE EXCEPTIONS: (1) If the parties live or do business in a place where letters are regularly and daily delivered by carrier of the government, or perhaps by private carriers, notice may be sent thru the mails.

(2) An indorser who, residing in a different town from that of the holder, has himself received due notice thru the mail, may notify a prior indorser by mail, tho that indorser resides in the same town in which the notifying indorser resides.

Eagle Bank v Hathaway, 5 Metcalf 212

(3) Where the parties live in different villages, or perhaps different districts of one town, the mail may be used for sending notice.

(b2) NOTICE BY OBLIGOR is good if delivered in season.

Fielding v Cory, 1 Q B Div (1898) 268

(b2) NOTICE BY MAIL. See N I L, Secs 174-176, according

to which notice by mail is sufficient in all cases. Mailing the notice is sufficient WHETHER THE INDORSER RECEIVES it or not.

Lindenberger v Beall, 6 Wheat 104; H N I L 544

NOTICE TO THE SEVERAL PRIOR INDORSERS good if made out to them severally, tho enclosed in envelope addressed to later indorser.

Wancet Bank v Butler, 11 Gray 387

In Von Brant v Vaughn, 47 Iowa 105,

it was held that such notices are good provided the party to whom they are directed himself sends them on.

WHEN AGENT GIVES NOTICE, his situation and not the situation of the principal controls. In other words, agent giving notice is treated as if he were principal.

NOTICE BY MESSENGER OF PRINCIPAL. This is the approved method in towns or villages - not the approved method in cities. If messenger be employed in lieu of mails where latter method is the approved one, notice must actually be given - that is, the indorser must actually receive notice, not later than the latest day on which it would reach its destination in due course of mail. Wherever permissible, it is safer to give notice by mail.

NOTICE IN SUCCESSION. Holder required to give notice only to his immediate indorser. Each indorser may in turn give notice to his prior indorser. Notice so given to first of five indorsers inures to benefit of holder, tho he gave notice only to fifth indorser.

WHEN NOTICE SHOULD BE GIVEN. The general rule is that notice should be given with reasonable diligence. Every step toward fixing the indorser's liability should be taken with reasonable diligence. Reasonable diligence in respect to TIME of giving notice is defined within fairly certain and narrow limits.

ON WHAT DAY SHOULD NOTICE BE GIVEN? On the day of dishonor, being the day of maturity, or on the first following secular day. Notice must be given on one of those days; otherwise indorser will be discharged, unless there be some excuse - of which later.

Bank of Alexandria v Swan, 9 Pet 33

Smith v Poylan, 87 N Y 590

WHEN DAY FOLLOWING DISHONOR IS NON-SECULAR, holder may wait till the first secular day. When no mail leaves on day following dishonor, holder may wait until the next departure of the mail.

HOUR OF THE DAY. Where notice is personal, if served at the place of business it should be served within business hours; if at the place of residence, outside the hours given over to rest. WHAT IS A REASONABLE HOUR of the day is controlled largely by the circumstances of each case.

Notice served by MAIL MUST BE DEPOSITED IN THE POSTOFFICE soon enough to reach the party in the usual course on the day following maturity and dishonor. Holder may notify any indorser he pleases, but has no more time to notify first than last indorser.

Simpson v Turney, 5 Humph 419

There is some disagreement in the authorities as to whether the holder has the ENTIRE DAY FOLLOWING the day of dishonor in which to mail the notice. If the only mail leaves at an unseasonable hour of the day following, the holder is not required to deposit the notice so as to leave by that mail. In such a case the law treats that day as if it were a non-secular day.

Lawson v Farmers Bank, 1 C St 206

The doctrine of this case has been doubted and denied.

Peabody Co v Wilson, 29 West Va 538

THE TRUE RULE SEEMS TO BE that the holder ought to avail himself at least of . some departure of the mail after business hours.

REASONABLE DILIGENCE IS THE RULE, and that is satisfied when holder sends notice as soon as he can after ascertaining the place of business or residence of the indorser, and whatever time he uses for that purpose is deducted. Each indorser has the same time to give notice as the holder has.

WHERE INDORSER RECEIVES HIS NOTICE ON A NON-SECULAR DAY, he may treat the next following secular day as the day of receipt and may give his notice accordingly.

NOTICE MAY BE SENT ON A NON-SECULAR DAY.

Deblieux v Bullard, 1 Rob (La) 66

Concerning the time of notice in case of paper INDORSED AFTER MATURITY, the rule is not so strict. Notice as late as two months after dishonor has been held seasonable.

Von Hoesen v Van Alstyne, 3 Wend 75

AN AGENT FOR COLLECTION IS TREATED AS A HOLDER, and, if he indorses, as an ordinary indorser.

WHERE NOTICE SHOULD BE SENT. As a general proposition: (1) To the place where it will most likely be received.

American Bank v Junk,... supra, H N I L 563

PERSONAL NOTICE TO INDORSER is good anywhere. If he gets the notice personally, that is enough.

DIFFERENT ADDRESSES. Where the indorser has different postoffice addresses, or where there are several postoffices in the town in which he resides, the notice should be sent, in the absence of exact knowledge, (a) to the postoffice nearest the residence of the indorser, or (b) to the one at which he usually receives his mail. (c) When facts are not known to notifying party, to the town address,- to the town itself. Sending notice to the town itself makes out prima facie case. (d) Proper deposit in postoffice or mailbox is sufficient. (e) Such act is considered exercise of reasonable diligence.

Roberts v Taft, 120 Mass 169

(f) IF LETTER WAS ACTUALLY RECEIVED, notice would be good without regard to office to which it was sent, and if sent to the town generally. (g) If party gives notice by mail, he should if possible send it to that office where indorser would be MOST LIKELY TO GET IT. USUAL POSTOFFICE FOR RECEIVING MAIL is the one to which the notice should be sent. (8) If indorser lives in one town and has his place of business in another, notice to either is good under the statute.

REMOVAL OF INDORSER. Indorser should give notice of remo-

val if he wants notice sent to new office.

In the absence of notice of removal, notice of dishonor is good if sent to former place of business or residence.

American Bank v Doone, H N I L 563

Nothing having occurred to suggest to the notifying party the removal of the indorser, notice to former place of business or residence is good. If there are circumstances from which notice of removal might be presumed, reasonable diligence in ascertaining the new address is required.

TEMPORARY POSTOFFICE. This does not amount to a removal by the law merchant. In case of indorsers SUCH AS CONGRESSMEN, who have their residence part of the year at the capital, notice sent to the capital is good.

Chouteau v Webster (Dan), 6 Metcalf 1

Walker v Stetson, 14 O St 89

Doubtful whether same rule is applied to members of the state legislature.

THE STATUTE HAS MADE THE MATTER DEFINITE and provides that notice may be sent to the place where the indorser is sojourning

MAKING INQUIRY. Notifying party should make reasonable inquiry as to the place of business or residence of the indorser so as to insure the delivery of notice there. The place of abode is presumptively the place of residence of the drawer. So of the indorser, if he has indicated his residence in connection with his indorsement. Not so however if the notifying party has reason to know to the contrary .

THE EXERCISE OF REASONABLE DILIGENCE IS THE CRITERION in all cases of notice. The notifying party is bound to the exercise of reasonable diligence.

-- January 9, 1903.

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LECTURE XII

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FROM DICTATION

OF EXCUSES OF STEPS REQUIRED to fix the liability of the indorser. The matter of fixing the indorser's liability has so far been considered on the line of the absolute necessity of taking the several steps already mentioned, in such form and in such season as the law demands. Circumstances may arise however to excuse the taking of these steps at the time they are required to be tkaen, or altogether, and the indorser may be held notwithstanding all or some of the steps toward fixing his liability have not been taken. This brings us to a consideration of the excuses of one or all of the several presumptively necessary steps. These excuses may be TEMPORARY or PERMANENT; in other words, there may be a postponement of the time when the steps should presumptively be tkane, or an omission of the steps altogether.

(1) TEMPORARY EXCUSE. If circumstances independent of the fault or negligence of the holder operate to prevent the taking of steps at the time they ought to be taken, such circumstances furnish a temporary excuse for not taking any one of the several steps. Rule may be stated thus: Whenever it has become impracticable, without fault of the holder, to take the steps at the time required, the holder is excused from doing so until a reasonable time after it becomes practicable to take the steps. This is the language of the statute and the language of the general law merchant.

Wyndham Bank v Norton, 22 Conn 213
Peer v Heinrichshaffer, 67 Mo 163; HNIL 521

(2) PERMANENT EXCUSE. This applies to cases where the taking of the steps is dispensed with altogether. I shall present the matter under the subdivisions, (1) EXCUSE OF ALL STEPS; (2) EXCUSE OF ANY ONE OF THE STEPS.

(1) EXCUSE OF ALL STEPS. It is obvious that if presentment and demand are excused, protest will be unnecessary. In that case there would be nothing on which to base protest. Permanent excuse of all steps may be afforded in two ways: (a) By WAY OF WAIVER; (b) NOT BY WAY OF WAIVER.

WAIVER IS an abandonment or surrender or relinquishment of a known right. It may be expressed or implied. It requires no consideration to support it. If one has a right and knows he has it, he may surrender it, abandon it or relinquish it. In other words, he may waive it voluntarily and without consideration. And so it is that an indorser having the right to insist upon the proper taking of the steps as conditions precedent to his liability, may directly or indirectly, expressly or impliedly, waive that right.

HOW WAIVER MAY BE MANIFESTED. (1') It MAY BE INCORPORATED IN THE INSTRUMENT ITSELF. Illustration appears in

First Nat Bank v Slaughter, 98 Ala 602; H N I L 231
Phillips v Dippa, 93 Iowa 35

Where the waiver is embodied in the instrument it is binding upon all parties. Where it is written above the signature of an indorser it binds him only.

(2') The indorser may write in connection with his indorsement 'DEMAND AND NOTICE WAIVED', or equivalent words. In such expressions the word 'demand' would be understood to include presentment.

(3') The WAIVER MAY BE ORAL. When the fact is established by evidence, a parol waiver is as valid and binding as a written one. The only difference is in the weight of the proof.

Arnville Nat Bank v Kettering, 106 Pa St 531

(4') BY A PROMISE TO PAY OR an assurance of payment. (a') IN TERMS. See

Glidden v Chamberlain, 167 Mass 486

Sigerson v Matthews, 20 How 496

(b') IN EFFECT or by implication. Illustrated by

Gove v Vining, 7 Metc 212; HNIL 564

This was a case of this form of waiver by assurance. An assurance of payment is manifested by such acts, declarations or conduct on the part of the indorser as tends to put the holder off his guard and induces him to forego making a demand at the proper time and place. It would be contrary to good faith to set up such want of demand and notice, induced by the indorser, as a defense. It must be reasonably clear however that the language relied upon as a waiver amounts to an assurance of payment. Words relied upon to make out an assurance of payment are not to be taken very strongly against the indorser. For example, where the indorser said he would 'stand good' for payment, it was held not to amount to a waiver.

Freeman v O'Brien, 38 Iowa 406

An indorsement with which the words 'eventually accountable' are coupled, has been held a waiver.

McDonald v Peel, 14 Maine 101

So is the word 'holden.'

Green v Arnold, 16 Maine 251

TIME OF WAIVER. Waiver may be made before maturity or after maturity. Waiver AFTER MATURITY must be made with full knowledge on the part of the indorser that he was discharged. If the indorser should make payment supposing that his liability had been fixed when it had not, he could recover the money back.

Schilleren v Carpenter, 61 Me 83

The knowledge here spoken must be LIMITED TO KNOWLEDGE OF THE FACTS. That the indorser did not know the LEGAL EFFECT of the facts, would not help him.

(b) EXCUSE ARISING INDEPENDENT OF WAIVER. This excuse may arise, (1') where the party primarily liable PLACES AVAILABLE FUNDS IN THE HANDS OF THE INDORSER to indemnify him in case he has to pay. The fund should be sufficient as well as available. When so indemnified, the indorser takes the place of the party of primary liability; hence presentment and demand are not required. In other words, they are permanently excused. It is doubted whether the placing of a fund in the hands of the indorser INSUFFICIENT to indemnify him would afford an excuse for not taking the steps, but it would afford an excuse if the entire

estate of the primary party were put in the hands of the indorser; for in that case the indorser virtually takes the place of the principal debtor.

Pond v Farnell, 5 Mass 170

Steps are not dispensed with by reason of being placed in the indorser's hands if the indorser is or may become absolutely bound to pay out those funds, as in the case of an ASSIGNEE FOR THE BENEFIT OF CREDITORS.

Cremer v Perry, 17 Pick 332

To satisfy the requirement that the funds should be available, the funds should be AVAILABLE IMMEDIATELY. They should be in the nature of bonds payable on demand, or something of that sort. Ordinary CHOSES IN ACTION ARE NOT AVAILABLE funds within the meaning of the term; nor are funds arising from business in which the indorser is partner with the maker or acceptor. Nor are funds held by an executor or administrator of the estate of a deceased maker or acceptor. Executor or administrator cannot prefer himself.

(2') IN CASE INDORSER IS THE PRIMARY DEBTOR. The ultimate liability of the parties may not be, and frequently is not, that which is disclosed by the paper to which they are parties. As between the parties, the indorser in form may be the primary debtor . . in fact. The maker or acceptor in form may be the secondary debtor in fact. The indorser who is as between the parties a primary debtor is not entitled to insist upon the steps being taken to fix the liability of an indorser in fact, and the steps may be dispensed with in such a case. Presentment and all other steps are excused. The indorser in form but debtor in fact may be treated as a party of primary liability. He has noone to indemnify him; so he suffers nothing by failure of the holder to take the steps.

The fact that the INSTRUMENT IS LOST does not excuse the steps. A copy may be substituted.

(2) EXCUSE OF PARTICULAR STEPS. (a) EXCUSE OF PRESENTMENT. When the taking of one of the steps is expressly waived or is excused, the question frequently arises whether anything further is embraced than the single step. Presentment and demand are frequently associated as one requirement, and, as pointed out heretofore, they are separate steps. Presentment may be excused in various ways. If the party primarily liable should repudiate all liability before seeing the paper, presentment would not be necessary and the taking of that step would be excused. That is true particularly where the holder calls for payment at the proper place. Excuses are LOOKED UPON WITH SCRUTINY and are not to be allowed unless clearly made out. An excuse of presentment would not extend to excusing any other steps unless clearly apparent within the rule above stated.

EXCUSE OF DEMAND IN TERMS will probably include excuse of presentment. Mere refusal of payment will not excuse presentment.

Arnold v Dresser, 8 Allen 435

In the case of REMOVAL OF PARTY PRIMARILY LIABLE, if the

removal be to another place within the state, reasonable diligence must be exercised in following the party and making the attempt to make presentment and demand. If the removal be FROM THE STATE, the holder is not required to follow. Whether presentment in this case should be made at the last place of business or residence of the party primarily liable, is a matter on which the authorities are not in harmony. That removal from the state excuses making presentment at last place of business or residence, is held in New York.

Foster v Julian, 24 N Y 28

That it does not afford excuse, is held in

Wheeler v Field, 6 Metc 290

In case of the MAKER OR ACCEPTOR ABSCONDING, the general doctrine is that this excuses the holder from making presentment. Some authority requires of the holder reasonable diligence to obtain payment notwithstanding absconding.

In the case of INSOLVENCY OF MAKER OR ACCEPTOR, the this fact were known to the indorser at the time of his indorsement it does not furnish an excuse for not making presentment.

In case of DEATH OF THE PRIMARY PARTY. In some states this fact excuses presentment altogether, provided the paper matured within the period during which the personal representatives of the deceased were exempted from suit. If the paper should mature after the period of exemption is past, presentment should be made. In regard to excuses, see

N. I. L., Sections 142-145

IF THE INDORSER WRITES in connection with his indorsement 'waiving notice', he does not thereby waive presentment.

(b) EXCUSE OF PROTEST. By the law merchant , only foreign bills of exchange were required to be protested. By the statute, inland bills and other negotiable instruments may be and in some cases must be protested. When an indorser waives protest, does he thereby waive anything more than the mere act of protesting? Considered in respect to foreign bills, protest is a necessary step to be taken, and the waiving of protest in respect to foreign bills would not be considered as waiving any other step. In respect to inland bills, the law merchant knew nothing about the protesting of inland bills. The indorser who waives protest on an inland bill must be considered to have intended to wai ve something and not to have been the party to a mere nugatory act. Therefore the waiving of protest on an inland bill would be considered to be a waiver of all steps.

(c) EXCUSE OF NOTICE. More is required to excuse this step than any of the others. ABSCONDING OF THE MAKER does not excuse the giving of notice. Notice not excused in case where presentment is excused, in the event of maker's or acceptor's death. Not excused where maker or acceptor was insolvent from the inception of the obligation and the indorser knew it all the while. If by possibility the indorser might suffer, notice must be given.

WAIVER OF NOTICE AFTER MATURITY, to be effectual, must have been made with knowledge of the facts.

Notice NEED NOT BE GIVEN TO DRAWER WHEN under circumstances already stated he is the party of primary liability, nor when he

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LECTURE XIII

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FROM DICTATION

(Continued from Lecture XII)

is person to whom presentment for payment should be made; nor when instrument was made or accepted for his accommodation.

American Bank v Funk, 94 Tenn 624; H N I L 563
In re Swift, 106 Fed 65

When notice of dishonor for non-acceptance has been given, notice of dishonor for non-payment not necessary unless meantime the instrument has been accepted.

N I L, Sec 187
Le La Torre v Barkley, 1 Stark. 308
Campbell v French, 6 T R 200

-- January 15, 1903

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THE CONTRACT OF THE VENDOR, THE ACCOMMODATOR AND THE SURETY.

(1) CONTRACT OF VENDOR. Cases bearing on this division:

H N I L 452-471

When one transfers by delivery or by qualified indorsement he transfers as a vendor. In both cases he is a seller. In both cases there is a contract of the common law.

Meyer v Richards, 163 U S 385; H N I L 452

The special liability of the indorser is excluded in both cases.

Challis v McCrum, 22 Kans 157; HNIL 461

When one transfers negotiable paper as a vendor HE WARRANTS (1) That the instrument is genuine and what it purports to be; (2) that he has good title to it; (3) that all prior parties had capacity to contract; (4) that he has no knowledge of any fact which would impair the validity of the instrument or render it valueless. These warranties are implied.

Giffert v West, 37 Wisc 115
N I L, Sec 115

Provision 3, supra, does not apply to persons negotiating public or corporate securities other than bills or notes under warranty. When by delivery, it extends to the immediate transferee only; is not negotiable. When by qualified indorsement, it extends to all subsequent holders in due course and is negotiable.

Otis v Cullom, 92 U S 448

DISTINCTION IN REGARD TO WARRANTY OF GENUINENESS has been made in cases where the transfer was for security. In the case of a sale of paper it has been thot that the doctrine of 'caveat emptor' should apply and that the warranty of genuineness did not apply. In the case of transferring for security it has been considered that the warranty of genuineness did apply. The better authority is that warranty covers BOTH cases.

Whether the WARRANTY EXTENDS TO THE SOLVENCY OF PARTIES primarily liable, has been disputed. Authorities are divided on

the proposition. By the apparent weight of authority, the warranty does not extend to the solvency of the primary party.

BROKER OR AGENT negotiating paper incurs liabilities of warranty above enumerated unless he discloses the name of his principal and the fact that he was acting only as agent.

N I L 119
Amer. Nat Bank v Gallandet, 120 N Y 289
Cabot Bank v Morton, 4 Gray 156
Worthington v Cowles, 112 Mass 30; HNIL 4 1

(2) CONTRACT OF ACCOMMODATOR. The contract of all parties previously mentioned may be modified and the rights and obligations of the parties thereto may also be modified if one of the parties shall be a accommodation party. Accommodation party is defined by

Sec 55, N I L
Grocers' Bank v Penfield, 69 N Y 502; HNIL 339

ACCOMMODATION PAPER IS an evidence of the loan of one person's credit to another.

Lenheim v Wilmarding, 55 Pa St 73

The accommodator cannot set up as a defense that the paper was given WITHOUT CONSIDERATION, for this would defeat the very purpose for which it was made.

Carpenter v Nat Bank, 106 Pa St 170

IN RESPECT TO THIRD PERSONS, the law considers the accommodator in the character he has assumed and will not permit him to allege that the paper to which he gave his name was an imposition, nor to gainsay its reality by proof that it was a fiction. It shall be taken pro veritate that he was a maker, for de veritate that was the very thing he was intended to be.

Bank of Montgomery County v Walker, 9 S & R 229
Stephen v Monongahela Bank, 88 Pa St 157

The contract of the accommodator is a CONTRACT OF THE LAW MERCHANT. Except as to the party accommodated, it is the same as if issued for consideration at the outset. Tho there was no consideration at the outset, a consideration must spring up afterward or the contract will be invalid. Somebody must afterward take the paper for value to have a claim upon the accommodation party. In respect to parties other than the one to whom the accommodator has lent his credit, there is nothing peculiar. Accommodation party is a surety as between himself and the accommodated party, no matter what the outward form of the contract is. Altho accommodation party is a surety he is not always so in the full sense. If he has taken a principal's position, such as acceptor, he is to be treated as such. For example, the acceptor is not a surety toward the holder even tho the holder knew that he accepted for accommodation. Accordingly he will not be discharged by acts of the holder which would discharge him if he were an ordinary surety or if he were an accommodation indorser, for the indorser is a surety for parties before him. One is an accommodation party only when he lends his name to another as a credit.

Peel v Addicks, 174 Pa St 543

EXCHANGE OF PAPER FOR MUTUAL AID does not constitute the making of accommodation paper.

A party making a note, accepting a bill or indorsing paper on the supposition that there is a valuable consideration for his undertaking when in fact there is not, or if there is a failure of consideration, is not bound to any holder of the paper who took it with notice of the want of full consideration, tho for value; but if the party so making, accepting or indorsing paper were the accommodation party he would be liable to a holder taking before maturity for value tho the holder took the paper with notice or even with full knowledge of the facts.

Moffatt v Green, 149 Mo 48

If the paper were taken from the accommodation party AFTER MATURITY the case would be different.

Peel v Addicks, 174 Pa St 549

(3) CONTRACT OF THE ASSURER. The assurer is one who stands sponsor for another's obligation. An indorser is in a sense an assurer. Anybody may indorse for the security of the holder of the paper. An accommodator, in whatever relation his name appears upon the paper, is an assurer. His purpose is to assure the performance of the real debtor's obligation. Other forms of assurance are guaranty, suretyship, mortgage. These are contracts of the common law, not of the law merchant.

The ASSURING OBLIGATION IS DIVIDED INTO TWO PARTS: (1) guaranty; (2) suretyship. Guaranty is a separate and distinct collateral agreement; (2) suretyship is part and parcel of the contract assured. Both are obligations to answer for the debt or default of another. Guaranty is assurance that the debtor can pay; in other words, that he is able to pay. Suretyship gives assurance that the debtor will pay. In the former the cause of action does not arise to the creditor until it appears that the debtor cannot pay; in the latter, the cause of action arises to the creditor as soon as the debtor fails to pay.

We will EXAMINE THE CONTRACT OF GUARANTY, (1) As disconnected with commercial paper, or in its specific sense; (2) as connected with commercial paper, and how that connection affects the contract.

Guaranty MAY BE MADE at the same time with the contract assured or after or before. There must be a consideration for the principal contract and for the collateral contract. Failure of consideration in respect to either renders invalid the contract of guaranty. When the contract of guaranty is made contemporaneously with the principal contract, the consideration of the latter supports the former. When made after the principal contract, there must be a separate consideration.

Tenny v Prince, 4 Pick 385
Green v Sheppard, 5 Allen 585
Moses v Lawrence Bank, 149 U S 298

To the rule as just stated THERE ARE APPARENT EXCEPTIONS, (1) where the guaranty was agreed upon at the time of making the principal contract and it was merely committed to writing afterward.

Hawks v Phillips, 7 Gray 284

(2) Where the consideration is a continuous thing running along

at the time of both the principal contract and the guaranty.

For example, a guaranty of the fidelity of an employe for a year.

Moies v Burr, 18 Mass 436
Leonard v Wiles, 36 Me 265

(2)HOW CONNECTION WITH COMMERCIAL PAPER AFFECTS THE CONTRACT OF GUARANTY. This will be treated under the three peculiar aspects of negotiable instruments, namely, consideration, negotiability and grace.

Does the contract of guaranty draw anything in respect to consideration from the law merchant, with which it is connected? Consideration of the principal contract of the law merchant is presumed and need not be proved. This presumption EXTENDS TO THE GUARANTY which assures the performance of the contract of the law merchant. On the basis of custom, it must be said that the contract of guaranty is not enlarged in respect to consideration from its mere connection with a contract of the law merchant.

-- January 16, 1903.

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LECTURE XIV

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A contract of the law merchant IMPORTS CONSIDERATION, and consideration is usually, altho not necessarily, expressed by the words 'for value received.'. In such cases the evidence relied on to support the principal contract may be passed over to support the contract of guaranty.

Bickford v Gibbs, 8 Cush 154

Whatever proves, even presumptively, a consideration to support the principal contract, proves enough for the guaranty.

CONSIDERATION AS AFFECTED BY THE STATUTE OF FRAUDS. The statute of frauds in some states requires that the statement of the consideration appear in the assuring contract. That provision is not affected by the fact that the contract assued is a contract of the law merchant. If it is necessary that the contract of guaranty should recite, state or refer to a consideration in cases not connected with contracts of the law merchant it is equally necessary with contracts of the law merchant, unless the instrument assured contains a recital of the consideration and is contemporaneous with the guaranty.

Moses v Lawrence Bank, 149 U S 298

In some states the consideration must be expressed in the guaranty. In some it is sufficient if expressed in the principal contract. For example, by the words 'for value received.' In some no statement of the consideration is required in either.

IS THE GUARANTY NEGOTIABLE? Guaranty was not a negotiable contract at the common law. Guaranty not negotiable when not connected with negotiable paper. Is it negotiable when connected with negotiable paper? There are two phases of the question: (1) Whether the guaranty when written upon negotiable paper operates like an endorsement to give a remote or subsequent holder all the rights of an indorsee against the guarantor as if an indorser; (2) whether it operates like an indorsement so as to give a transferee the right of an indorsee against prior parties. The two phases of the question make no difference with the result. As to whether the guaranty is negotiable, the AUTHORITIES ARE NOT IN HARMONY. Earlier authorities were to the effect that a general contract of guaranty, when written upon a negotiable contract of the law merchant, was in itself a negotiable contract. E. g., the payee of a negotiable note writes on the back of it: 'I guaranty the payment of the within note', and transfers it to another, who indorses it to plaintiff. The payee's writing is deemed an indorsement and his liability is fixed as such on notice.

Partridge v Davis, 20 Vt 499

THE LATER AUTHORITIES HAVE DECLINED TO FOLLOW the earlier ones holding the guaranty negotiable. E. g., a note is payable to A. He writes on the back 'I hereby guaranty the within note.' With this writing on the note A transfers it to B and C, who indorse it to plaintiff D, who brings suit against the maker. The plaintiff cannot

recover, the writing not being an indorsement or the equivalent of an indorsement.

Belcher v Smith, 7 Cush 482

AS TO GRACE. Guaranty does not draw grace from its connection with a contract which is entitled to grace. The matter is of no moment, because the contract of guaranty does not become an obligation on which suit can be brot, until maturity of the principal contract and default therein.

If the contract of transfer is a guaranty in form BUT AN INDORSEMENT IN FACT, the maker of the contract is entitled to the same notice as an indorser.

SURETYSHIP. The contract of the surety is part of the original contract. Whatever pertains to the original contract pertains to the contract of the surety. As to consideration, the consideration of the principal contract supports the consideration of the contract . of the surety.

NEGOTIABILITY. No question can arise, because the surety's contract is one with the principal's.

GRACE. The same is true with regard to grace. The surety's contract reaches its maturity at the same time the principal contract matures.

SECURITY BY WAY OF MORTGAGE stands on a footing of its own. It is an incident of the instrument assured. Negotiability and transfer go with the obligation secured.

DEFENSES. So far we have looked to the obligations of parties to negotiable instruments, or to such parties as had obligations to fulfill. Turning to view the RIGHTS of a party to a negotiable instrument, we speak of

THE HOLDER. The holder of a negotiable instrument, being a holder in due course, enjoys certain rights or privileges not accorded to the holder of a contract of the common law. Certain defenses which might be urged against the holder of a contract of the common law cannot be urged against the holder of a contract of the law merchant.

DEFENSES ARE DIVIDED INTO two classes: (1) Absolute defenses; (2) equities. A more logical name for these is 'real defenses' and 'personal defenses'. But the terms ABSOLUTE DEFENSES and EQUITIES cannot be ignored, because they are generally employed by the bench and bar.

AN ABSOLUTE DEFENSE, or a real defense, is one which can be urged against the instrument itself in whosever hands the instrument may be. PERSONAL DEFENSES, or EQUITIES, can be urged only against certain persons.

ABSOLUTE DEFENSES MAY BE DIVIDED INTO those which include (1) A WANT OF CONTRACT. That may be divided into two classes: (a) want of contract BY FAILURE OF DELIVERY, and (b) want of contract by FRAUD IN ESSE CONTRACTUS. (2) WANT OF CAPACITY. That division embraces COVERTURE (in some jurisdictions), INSANITY, INTOXICATION, CORPORATE INCAPACITY. (3) A third division of absolute defenses is DOWNRIGHT ILLEGALITY OF CONTRACT, or illegality when the contract is declared void by the statute. (4) A fourth division is DISCHARGE OF THE INSTRUMENT - (1) by

ALTERATION, (2) CANCELLATION, (3) PAYMENT, (4) RENUNCIATION oR RELEASE at or after maturity.

(1) AS TO ALTERATION, it must be a material alteration in order to constitute a defense. A MATERIAL ALTERATION REQUIRES the concurrence of four things: (1) CHANGING THE LEGAL EFFECT OF THE INSTRUMENT; (2) MADE WITH SUCH INTENT and having become final; (3) WITHOUT CONSENT; (4) BY A PARTY TO IT OR by one in lawful possession or custody of it.

STATUTE OF LIMITATIONS. The EQUITIES or PERSONAL DEFENSES ARE DIVIDED as follows: (1) FRAUD WHEREBY the defendant was induced to execute the instrument. This must be sharply contrasted with fraud in esse contractus. (2) DURESS. (3) Want or FAILURE OF CONSIDERATION. (4) ILLEGALITY,UNLESS the contract is declared void by statute. (5) PAYMENT OR RENUNCIATION OR RELEASE before maturity. (6)DISCHARGE of parties secondarily liable by discharge of prior party.

The personal covenants ARE BASED UPON THE FACT that there was a contract, but as against the person who is seeking to recover on the contract the defendant has a defense. The simplest illustration of the rule is where there is a want or failure of consideration. As between the immediate parties, the contract cannot be enforced. One who takes such a contract as a holder in due course can enforce it against the defendant. The instrument once had an existence. It was voidable as against the defendant by reason of a wanr of failure of consideration. That defense can be urged against the person; therefore it is a personal defense, or what is otherwise known as an equity.

Equities, or personal defenses, CANNOT BE URGED AGAINST a holder in due course.

-- January 22, 1903.

F I N I S

B I L L S A N D N O T E S

CASES ASSIGNED FOR SPECIAL REVIEW.

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1 Goodwin v Robarts, L. R. 10 Exch 337; JNIL 151
2 Geary v Physic, 5 B & C 234; HNIL 161
3 Reg. v Harper, L R 7 Q B Div (1881); H 162
4 Brown v Butchers, &c, Bank, 6 Hill (N. Y.) 443; H 164
5 White v Cushing, 88 Me 239; H 177
6 Worden v Dodge, 4 Den. 159; H 180
7 Redman v Adams, 51 Me 429; H 188
8 Siegel v Chicago Trust, &c, Bank, 131 Ill 569 H 190
9 Lodge v Emerson, 34 Me 96; H 195
10 Wilson v Campbell (Mich), 68 N W 278; H 210
11 Hastings v Thompson, 54 Minn 184; H 212
12 First Nat Bank v Slette, 69 N W 1148; H 218
13 Henick v Bennett, 8 Johns 374; H 236
14 Benny v Robinson, 9 Johns 121; H 236
15 Jordan v Tate, 19 Ohio St 586; H 238
16 Show v Camp, 160 Ill 425; H 240
17 Kelley v Hemmingway, 13 Ill 604; H 241
18 Musselman v Oakes, 19 Ill 81; H 258
19 Curtis v Sprague, 51 Calif 239; H 268
20 Hillsdale College v Thomas, 40 Wis 661; H 275
21 Kinyon v Wohlford, 17 Minn 239; H 279
22 Burson v Huntington, 21 Mich 415
23 Baxendale v Bennett, L R 3 Q B Div (1878) 525; H 280
24 Ives v Farmers' Bank, 9 Allen 236; H 293
25 Dart v Sherwood, 7 Wis 523; H 302
26 Andenton v Sharp, 17 Ohio St 125; H 304
27 White v Madison, 26 N Y 117, H 311
28 Frazier v Mossey, 14 Ind 382; H 321
29 Lancaster v Baltzeel, 7 G & J 468; H 322
30 R R Co v Nat'l Bank, 102 U S 14; H 327
31 Simon v Merritt, 33 Ia 537; H 417
32 Kost v Bender, 25 Mich 515
33 Markey v Corey (Mich), H 343; 66 N W 493
34 Hening v Woodhull, 29 Ill 92; H 348
35 Hughes v Kiddell, 2 Bay (S C) 324; H 350
36 Dwight v Pease, 3 McLean 94; 8 Fed Cas 186; H 371
37 Hays v Hathorn, 74 N Y 486; H 382
38 Kelley v Whitney, 47 Wis 110; H 394
39 Losee v Dunkin, 7 Johns 70; H 396
40 Hamilton v Vought, 34 N J L 187; H 400
41 Dresser v Missouri, &c, Co, 93 U S 92; H 415
42 Brown v Reed, 79 Pa St 370; H 591
43 Cape Ann Bank v Burns, 129 Mass 596; H 590
44 Linn v Horton, 17 Wis 151; H 550
45 Mills v Bank, 11 Wheat 431; H 534
46 Am. Nat Bank v Junk, 94 Tenn 624; H 563
47 Gove v Vining, 7 Met 212; H 564

L E C T U R E S

O N

P R I V A T E I N T E R N A T I O N A L L A W

B Y

PROFESSOR OTTO KIRCHNER

Reported by C. G. McCollom

U N I V E R S I T Y O F M I C H I G A N

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LECTURE I.

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What is private international law? Private international law concerns itself with transactions that have taken place in a foreign jurisdiction, that is a jurisdiction other than that in which the matter is adjudicated. For instance, a contract is made in Europe, and the contracting parties find themselves in this country. One of the parties sues the other for a breach of the contract. That contract may be required to be interpreted by the law of the country in which the contract was made. Or a wrong may be committed in a foreign country and that wrong sought to be redressed in the courts of this country. The first question that is presented is, whether such wrong may be redressed by the courts of this country. If this question is answered in the affirmative, then the question presents itself, how far the courts of the country may consider the laws of the place in which the contract was made or the transaction occurred. Here we have a case of private international law.

The term "international law" has been very much criticised. It is said the term itself involves a contradiction, for that which is private is not international. It is a term which has attained almost universal acquiesence and acceptance. The term is used by the French, German and Continental lawyers and in part by the English lawyer. It makes very little difference what we call a thing if we understand the thing sought to be designated. Notwithstanding the many criticisms that have been passed upon this name it is common usage to call this branch of the law Private Internaticnal Law.

It has also been designated as the Conflict of Laws, which seems to be a very serious misnomer. It is called the Conflict of Laws because the law of the place of adjudication may conflict with the law of the jurisdiction in which the transaction took place. In determining all such controversies the court in the jurisdiction other than that in which the act was done will adopt, for the purpose of determining that controversy, the law of the place where the transaction occurred as part of the law of the land in which adjudication is sought. So you will see that the term "Conflict of Laws" does not describe this branch of the law any more than the term "Private International Law".

Mr. Holland in his treatise on the subject, says, that the term "Private International Law" is a barbarous compound, and suggests in its place, after its decent burial and abolition, the term "Extra-Territorial Recognition of Rights". Notwithstanding the great reputation and learning of Mr. Holland this term has not received acceptance.

The oldest writer upon this subject that I know of is Mr. Ullrich Huber. He was a Dutchman and was born in Holland in the

year 1636, and in accordance with the custom of his time, he wrote in Latin. It is a very valuable work and those who desire to make a specialty of this subject should do well to profit by it.

The greatest writer upon the subject was a German with something of a French name--Doctor Frederick Carl Von Savigny, born in Frankfort on the Rhine in the year 1779. His work is published in eight volumes, and is the standard work upon the subject. It is entitled "The Modern System of Roman Law, and is a scientific work of profound merit. It has been translated into every civilized language of the world and is the standard work in all countries to-day. It differs from the common run of text books that you and I are familiar with in that it does not give any citation of cases. The whole thingis worked out on philosophic principles. When you read the work you must have your whole mind upon it because one proposition or statement follows another in logical sequence just as one proposition in Geometry follows another. Bacon, in his Essays, says that some books are to be tasted, and others are to be twice chewed and digested. Savigny's book is one that must be twice chewed and digested. The book stands as a profound monument of learning and scholarship and it has not been superseded and in the nature of the case cannot be superseded.

There is a little work entitled "Henry on Foreign Law" which is a very interestingand valuable book.

Sir Robert Joseph Fillmore wrote a Commentary on International Law in four volumes, which was published in 1854-61. They are said to be the most scientific commentaries upon International Law extant. The fourth volume of the work is devoted to a discussion of the principles of Private International Law and is a very valuable work.

The most recent of foreign treatises is that of Carl Ludwig Barr of Germany.

Dicey on the Conflict of Laws is a good modern work. Recently Mr. Dicey has enlarged his book under the title of "Digest of Private International Law", which is the best treatise for the use of students that I know of.

Wm. Beach Lawrence, an American writer, has issued a four volume commentary on Wheaton's International Law. The last two volumes of this work are devoted to Private International Law.

The late president Wolsey of Yale has written a work on Public International law, which is a very scholarly work.

Justice Story wrote upon this subject, and his work is entitled "Conflict of Laws".

Dr. Wharton has also written upon this subject. Mr. Wharton was not a practical man, and his work smells of the midnight lamp oil.

The body of Private International Law is made up of the principles that control the recognition and application of the laws of foreign jurisdictions to cases in the determination of controversies submitted to courts of justice.

Mr. Gray in
159 U.S. 163,

says: "Private International Law concerns itself with the rights of persons within the territory or dominon of one nation by reason of acts, private or public, done within the dominon of another nation."

Mr. Geo. Smith in a little book entitled "The State", Sec. 53, says, "The so called system of Private International Law includes the principles which give to transactions taking place outside the state, which are presented to the courts of the state for determination, their legal character ar status."

Private International Law is to be distinguished from Public International Law, or the Law of Nations.

Private International Law is invoked for the enforcement of private rights in contradistinction from political rights.

The boundary between public and private international law and the boundary between private rights and political rights is very difficult to define.

A political right is one that pertains to the state or soverignty The question of boundary between two states is said to be a political right. A question as to the boundary line between two adjacent owners of land is a private right.

Public international law defines the relation of sovereign states to each other, or the obligations of citizens towards the states in times of peace or war.

Public International Law is part of the law of the land, part of the Municipal Law of the land and as such it must be considered in many cases in the application of the principles of private International Law.

Oct. 1st, 1903.

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L E C T U R E II.

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The best definition of a State that I have found is given by Wolsey on International Law: "A community of persons living in certain limits of territory under a permanent organization which aims to secure the prevalence of justice by self imposed laws." If the laws are imposed by somebody else that people have no risan to the dignity of a State. The people that takes its laws from without is not a state. Some learned men for this reason have contended that the states of the American Union are not states because they are governed by the laws of the United States and are not self imposed; in other words, the sovereignty of the United States as a state is paramount to the authority of the several states At first blush that would seem to be so. I have known some learned professors who have made the contention that the states of the American Union are not states in an International sense or in any sense. But when we come to consider that the people of the several states have delegated through the Constitution all the powers exercised by the Federal Government over them it does appear to be self imposed. For the purposes of this discussion this definition holds good.

I think it was fully vindicated in the famous case of,

Cheorokee Nation v. Ga., 5 Peters 1.

In this case the Cherokee Nation brought suit against the State of Georgia in the United States Court. It washeld that the Court had no jurisdiction, as the Cherokee Nation was not a State because it was not governed by self imposed laws.

It is said by most writers that every state has a moral nature and that this moral nature makes itself felt in judicial controversies. Mr. Geo. Smith says that a State is a mere political entity and that ithas no moral nature.

I can hardly conceive of a community that would disclaim the maintenance of justice to be the chief purpose of its existence.

Mr. Woolford in his great work on the Law of Nations says that a State is a moral and political organization.

I think that both historically and from a standpoint of jurisprudence a state does possess a moral context and that its dignity historically and otherwise and its benificient influence depends upon the quantity and quality of its moral nature.

There are a number of terms that you will have to deal with in the study of this subject and I want to call your attention to a few of them:

I will have occssion to use the word "status". A thing has either a political or civil status.

A person's civil status designates the relation he sustains to another person or thing. As for example, the father sustains the relation of parent to his child.

A person's political status designates the relation he sustains to the government. As for example, I am a citizen of Michigan.

A persons civil status may be determined by his political status. As for example in some jurisdictions an alien may not own real estate.

Another term that has given no end of difficulty and confusion is the term "Comity". Ordinarily when we speak of "Comity" we mean courtesy.

In a certain sense comity is curtesy, but in connection with the subject of Private International Law comity is not curtesy and the phrase really has not place in the law. You may say that a foreign corporation has no right to do business here but it is suffered to do so as a matter of comity. A foreign corporation can come in here and you cannot stop it from doingbusiness unless it is prohibited by the legislature from so doing.

Mr. Dicey says that it is an idle war of words.

Mr. Geo. Smith says that foreign law is applied not on the ground of comity, but because justice demands that it should be.

Take the case of a contract made in France and sued upon in Michigan. The courts of Michigan will give judgment upon the contract, but it will be according to the law of France. Is it really a matter of curtesy or justice? If the Courts of Michigan should ignore the laws of France under which the contract was made they would be enforcing an entirely different contract from that which the parties made. When that contract was made in France the rights of the parties were determined then and there. Now comes a court of foreign jurisdiction and pretends to pass upon it. It says we will recognize the lawof France as a matter of comity. It is not a matter of comity. It is a matter of duty; it is a matter of justice.

This is illustrated in the case of
Thompson v. Watters 25 Mich._____.
This matter came up before the Scottish Courts in
8 Bell Reports 106.

Dicey in his introduction to Private International Law says at page 14, the term comity is open to the charge that the judge applies foreign law as a matter of favor or caprice.

13 Mass. 6.

The case of

13 Peters 519 puts this question in a very clear light.

The whole subject of comity is considered in the case of
159 U.S. 113.

In thiscase the defendant as purchasing agent for a large firm in America went to France and purchased something like a

million dollars worth of gloves. He was sued in France for the purchase price, but before judgment was rendered against him, he shipped the goods to the United States. Judgment was recovered in France, but there was no proterty in France out of which the judgment could be made. A transcript of the judgment was made and suit brought upon it in the Southern District of New York. Upon appeal to the Supreme Court of the United States, after the lower court had held that as a matter of comity, the American court must recognize the judicial act of the French tribunal, it was held by a majority of the judges of the Supreme Court that the judgment of the lower court should be reversed: that the entertainment of a suit upon a foreign judgment is a matter of comity and that inasmuch as the court of France did not recognize judgments rendered by the United States Courts, the court of the United States ought not to recognize judgments rendered by the courts of France. The dissenting Judges say that "Res Adjudicata does not rest upon the discretion of the Court, and it is for the government not for the Court to take steps of retaliation.

If that is a correction notion of comity then there is no self imposed obligation on a State to recognize the laws of another country in so far as they do not conflict with their own public policy.

Barr. Priv. Int. Law Sec. 32.

Wharton, Sec. 3.

You will find throughout the books and the opinon of judges that the laws of the foreign jurisdiction should be recognized by the court hearing the matter, unless the public policy of the country forbids. This brings us to the question as to what public policy is. I do not know. I do not know of anybody that does, unless it means the law of the land, and in such a case the term public policy is a superflous term.

The term has lead to no end of controversy, and I shall call your attention to a few of the case:

2 Bing. 229.

In this case it is said: "Public policy is an unruly horse, and no one knows where he may lead us."

Kent's Comm. Vol. 2, p. 458.

Mr. Kent says that no people or power ought to enforce any law of a foreign country which is injurious to the public rights or offensive to morals or contravenes their public policy or violates a public law.

The question was discussed in the famous Girard Will Case.

2 How. 197.

In this case Mr. Girard made a will in which the City of Philadelphia was given a large sum of money for the erection and maintenance of a certain college on condition that no priest or minister of the Christian religion be ever permitted to enter its

walls. This will was attacked, first, on the ground that this trust was invalid because it was not competent for a municipal corporation to act as trustee; secondly on the ground that it was against public policy because it was subservient to good morals and the Christian religion. The Supreme Court said that the will was not contrary to the laws and the Constitutions of the United States and the State of Pennsylvania, and outside of that they knew nothing of public policy.

The question came up in
5 Wall. 11.
166 U.S. 340-1.

Here the Court says that the public policy is to be found in the Consitution, the Statutes and Decisions, and if nothing is said there, then in the pratice of public officials.

Oct. 1st, 1903.

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LECTURE III.

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At the close of yesterday's lecture I was considering the subject of Public Policy. I had called attention to the famous Girard Will case. The next case to which I wish to call your attention is,

Swan v. Swan, 21 Fed. Rep. 299.

This was an action brought in Arkansas upon a promissory note made in Tenn. This note was made on Sunday and according to the laws of Tenn. was valid. Had this note been made in Arkansas it would not have been valid because the laws of Arkansas made void all contracts made on Sunday. Here was an action on a contract valid by the laws of the state where it was made sought to be enforced in a jurisdiction that prohibited the making or enforcement of that kind of a contract. It was urged that inasmuch as the laws of Ark. inhibited the enforcement of such a contract its enforcement in Arkansas was contrary to public policy. The Federal Court sitting in Arkansas said not so. They said there was no question of morality involved. The laws which forbid the making of contracts upon Sunday are not based upon religous grounds, theyare based upon public policy. A law prohibiting the making of a contract on Sunday on religous grounds would be unconstitutional. It rests upon the exercise of the police power and therefore the Federal Court held that a contract made in Tenn. contrary to the laws of Ark. could be enforced because valid under the laws of Tenn. Put this case along side of the other cases and it ispretty hard to reconcile them upon principle.

7 Taunton 317.

I have tried very hard to reconcile the cases and to deduce , if possible, some general principle from them, but I have been unable to do so.

As I have said, the Law of ations is part of the Municipal law of the land; when you come to ask, what is the Law of Nations; where is it to be found; you present a question of exceeding difficulty.

The Law of Nations may be said to be a body of rules orlaws deduced by naturalreason and established by the consent of the the civilized nations of the world. As in all other things in law, this consent may be express or implied. Its existence may be inferred from facts and circumstances. Some years a go there was pending in the Supreme Court a dispute as to the boundary line of one of the States upon the Mississippi River. This dispute was determined by the rules of Public International Law. The court after reading the opinons of certain jurisists and text writers on the subject and finding what seemed to be the consensus of opinon upon the subject, they held it to be conclusive evidence of the existence of the law.

The States are equal each to the other, therefore it follows that no law of nations can be binding upon one community to which it

has not assented.

The most important case that I know of in the books that presents the question as to whether a rule of International Law claimed to exist and whose existence is disputed, does exist, is the case of,

2 DR.(Ex. Div.) 63.

A certain Mr. Keyn was the captain of a German vessel and when approaching Dover within a marine league of the British shore his vessel collided with another and a number of persons were killed. The English vessel came to the rescue and among other persons picked up was Capt. Keyn. It was suggested that Capt. Keyn was negligent and that hisnegligence resulted in the death of these people and he was indicted in the English Courts for manslaughter. The first thing that was necessary to be proven was the venue. It was alledged in the indictment that this happened in the County of Dover in England. If it did not happen in England and in the county of Dover as alleged the court had no jurisdiction over the case. This accident happened three miles from shore and the contention on the part of Keyn was that this event did not take place within the territory of Great Britain. The contention of the Crown was that it did take place within the territory of Great Britain because the sea within three miles of shore is part of the territory of the state boundingthe sea. The jury found that Keyn was negligent and guilty of manslaughter if the court should be of the opinon that this thing did take place withing the territory and limits of Great Britain. (They have a way of reserving a question of law in England.) That question was given to a number of judges and each of them delivered an opinon and it was decided by a majority of one that if there was a law according to which the territory of a state extended one marine league into the sea, that Great Britain had never assented to such doctrine, and therefore this thing nothavingtaken place withing the territory of Great Britain Keyn was acquitted.

A law or statute existing at the time of the making of a contract is read right into the contract as a part of it just as much as if it was put right into the contract in so many words. Therefore a contract made in Great Britain and sought to be enforced in America must be considered under the light of the laws of Great Britain in orderto understand exactly what the contract is. If you do not you may not enforce the contract intended by the parties. The mere statement of this principle would seem to necessarily carry conviction with it, but nevertheless this rule has not always been recognized.

Kent, 2 vol. 455.
1 Wm. Blackstone 261
L.R. C.B. 26

This was an action brought for damages against a man who had been governor of Jamacia during a rebellion, and who had done things

in the suppresion of the rebellion not warranted by law. He had mistreated the plaintiff and the plaintiff brought an action against him for false imprisonment and assault and battery commited in Island of Jamacia. This action was brought in England and in the meantime the legislature of Jamacia passed an act vindicating the defendant. The question was how far this act was brought into the action so as to acquit the defendant.

It is said as a general rule in order to found a suit for a wrong done in a foreign jurisdiction, it is necessary:

(1) That the wrong be of such a nature that it would have been actionable if committed in England.

(2) It must nothave been justifiable under the lawof the place where it was done.

Upon this last proposition I want to call your attention to, 2 Q.B. 231

This was an action for a libel published in Brazil. Under the laws of Brazil there is no private right of action for libel, but there is a criminal action. It was therefore contended that the case could not be tried in England, where ~~xxxxxx~~ there is both a criminal and civil action for libel. The Court held that the wrong was recognized as a crime in both countries, and that the fact that different forms of redress were granted was no reason why the Court should not assume jurisdiction.

Harv. Law. Review, Dec. 1897, p. 261.

I come now to a consideration of acts committed upon the high seas. It is the common saying that the flag of the ship governs. That is not so. Where a wrong or other act is done on board a vessel upon the high seas the controversy will be determined according to the maritime law as it is administered in the forum.

29 Fed. Rep. 283
Foster's Private International Law, 398-403
6 Probate Reports 148
105 U.S. 24-29.

For a full discussion of the subject see,
Wheaton's International Law, sec. 80.
Smith's Leading Cases, Vol. 1, 765,782.
10 Mich. 283.

The next term which demands our attention is the term"domicile". Domicile is a legal concept invented for the purpose of working out a legal problem. It is usually employed for the pirpose of ascertaining the legalstatus of a person or thing. The civil status of a person issaid to be governed by the law of his domicil. A person may have a private domicil and he may have a commercial domicile. A man's commercial domicile has very little to do with private international law. If I residing in Michigan set up a business in London and war breaks out between England and America, my commercial domicile with respect to that business would be England. I

would be considered as an alien enemy. If a consignment of goods from this house should be shipped and captured upon the high seas by a United States Cruiser, I would not lie within my power to say that these goods belong to me and that as I am a citizen of the U.S these goods are not enemy's property subject to seizure by the U.S. This commercial domicile is a thing separate and distinct from the domicile thatwe are about to consider. This commercial domicile is a legal concept invented in order to ascertain the public status of a person whereas the other domicile is devised for the purpose of ascertaining a person civilx status as contradistinguished from political status.

Broadly speaking the domicile is the home of a person. A person may have a great many homes, but he can have only one domicile It has been said that a domicile is the place which a person regards as his home, a place when he is away from it he is said to be away from home and when he has returned he is said to have returned. Broadly speaking, a person's domicile is the place of his home, which he has adopted with the intention of remaining and to which when absent, he intends to return. But where a man has a dozen kept up the year round, of equal importance, and any of which he is liable to occupy at any time, which may be said to be his domicile. The question as to what a man domicile is presents questions as diffi cult and varied as the question of public policy.

---oOo---- Oct. 2nd. 1903.

L E C T U R E IV.

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In my last lecture I had already introduced to you the subject of 'domicile'. It is treated more or less in all the books. Jacob, an American writer, has devoted an entire book to the subject, entitled "Jacob on Domicile." It is a very able book, but I would not advise you to purchase it unless you have a surplus of cash.

I said to you in the former lecture that 'domicile' was not a tangible thing like a chair or desk, but has a purely substantive existence. It is a legal concept to work out a certain legal result. The legal concept of domicile was not indigenous to the common law of England, but came from the Continent of Europe. The word is of recent introduction into the English law. A few years ago you could not find the word in the English dictionary. I say, from the authority of Dr. Wharton, that the word is not to be found in any of the English law books from the time of Granville down to the time of Blackstone. The law of domicile so far as it figures in the common law is of comparative modern origin. This legal concept is used to determine or work out the personal or political status of a person.

What is domicile? The law assumes that a person is domiciled somewhere as soon as he is born. The domicile which the law assigns to everybody at birth, is known as the domicile of origin. The domicile of origin, assigned by the law, is the domicile of the father at the time of the birth of the child. Suppose you are born in the city of Ann Arbor and your father resides at the time of your birth in the city of Ann Arbor, then the law says your domicile is the city of Ann Arbor, not because you were born here, but because yourfather's domicile was Ann Arbor at the time of your birth. But suppose your father's domicile at the time of your birth was New York and you were born in Ann Arbor, your domicile of origin would not be Ann Arbor, but New York. The domicile of the father is imposed upon the child immediately it is born.

In contemplation of law an illegitimate child has no father, so the domicile of origin of an illegitimate child would be the domicile of the mother at the time of its birth.

There is a commercial domicile of which I have already spoken, and to which I shall have occasion to refer in another connection.

What is this legal concept which we designate domicile? Broadly speaking domicile is a person's home which he has adopted with an intention of remaining and to which when absent he intends to return. This is the definition in substance given by the Supreme Court of this state in the case of,

22 Mich. 178

24 Mich. 275
62 Mich. 15

It will occur to you at once that this definition is defective. It takes no account of the domicile of origin. A child a month old has a domicile of origin and it has not adopted this domicile with any intent whatsoever. But the definition holds fairly good with respect to the domicile of the father whose domicile is imposed upon the infant.

I do not think it is possible to define domicile. I have reference, of course, to a philosophical definition that distinguishes and differentiates and points out the marks which characterizes the thing sought to be defined and at the same time distinguishes or differentiates it from all other things with which it may be counfounded or for which it may be mistaken.

The French Code defines it in this way: The domicile of every Frenchman is where he has his principal establishment. This definition does not indicate what is to be understood as a person's principal place of residence. Where a man has a dozen different houses kept up the year round, ofequal importance, and any of he is liable to occupy at any time, which may be said to be his principal establishment?

I am going to give you some more definitions, not with the hope of finding a perfect definition, but for the purpose of presenting to you this legal concept in the varied lights which it appears to the various individuals who have sought to define it. You can only get a fair understanding of the legal concept of domicile by a critical study of what it embraces, and what it excludes.

Salvigny, in giving a definition of domicile, says" Domicile is " a person's true, fixed and permanent home and principal establishment and that is the center of his legal relations and business, and to which, whenever he is absent, he has the intention of returning. This takes no account of the domicile of origin. This definition is also open to the objection of difficulty in determining the permanent place of abode of a person.

Dr. Wharton is very brief in his definition; he says,"A residence acquired as a final abode. I know of no final abode in this world except the cemetery.

Fillamore in his work on Domicile says that domicile answers very much to our word 'home', and when a person posses two residences, the prhase that he made the latter his home, will make this his domicile. (Chapt. 2, p. 13)

It is important to distinguish between residence and domicile. The former signifies a temporary place of abode. It is said a person may have his residence in one place and his domicile in another. A person may have many residences but only one domicile.

1 Wall. Jr. 232

The laws of distribution and succession depend upon the law of domicile. A person dies in Ann Arbor; he is possessed of considerable personal property. He is domiciled in New York. His personal property will be distributed according to the law of his domicile and not in accordance with the law of the place of residence.

2 H. & C. 985. 3 H.H. 123

I have said that a person may have only one domicile. It seems to me that this follows naturally from the n ture of domicile. This legal concept is invented for the purpose of discovering the law in relation to which this person stands to the end that his property rights may be fixed. Now if he has two domiciles, then, it follows that this person stands in two relations. He may stand in two conflicting relations and if that be so then of course the legal relation in which he stands to his property is not fixed.

Westlake Priv. Int. Law. 168

Residence and domicile are two practically distinct things. It is necessary in the administration of the law that the idea of domicile should exist, and that the fact of domicile should be ascertained in order to determine which laws shall determine the rights of the party. The succession to and disposition of property depends upon the domicile.

Chief Baron Pollock delivered himself in this fashicnin 2 H & C. 985: " I think that for certain purposes a person can have more than one domicile. I apprehend that a peer of England, who is also a peer of Scotland, who has estates in both countries, who comes to England to Parliament, and returns to Scotland to enjoy the country, has a domicile both in England and in Scotland." He has in mind a vague idea of what has been lately termed commercial domicile.

Professor Barr says that the Roman Law recognized that a person could have two domiciles if he indifferently selected two places as his center of activities. But the Roman idea of domicile differed exceedingly from our idea of domicile. The Roman domicile was used for the purpose of ascertaining what court had jurisdiction of the defendant.

The term 'domicile' and the term 'residence' must be closely distinguished, and I deem it my duty to say that when the term 'residence' or 'inhabitance' is used in a statute or Constitution it is usually employed in the send of 'domicile'.

2 Kent 43
132 Mass. 89
42 Wis. 97
54 Iowa 208
40 N.Y. Supt. Ct. 360

In this last aase, a youngman under age whose father was domiciled in the City of New York, but who had remained behind in Ireland, set sail for New York intending to come to New York; but before he reached the port of New York he died. An attempt was made to administer his estate and the jurisdiction of the court depended

upon the question whether this young man was a resident of the city of New York at the time of his death. In a literal sense he was not a resident of New York because he was never there, but his father was domiciled in New York and being under age the law imposed the father's domicile upon the son. In legal parlance he was domiciled at the time of his death in the city of New York and the court held that if he was domiciled in the city of New York he was a resident of the city of New York, not in the ordinary sense, but within the intent and meaning of this statute.

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Oct. 8th, 1903.

LECTURE V.

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It is important to distinguish between domicile and citizenship. The European countries, except so far as they have surrendered the doctrine by treaties, hold a very broad doctrine,-'once a citizen always a citizen.' Andrew D. White formerly Minister to Germany, has written some very interesting articles, which are now running through the 'Century' giving very amusing accounts of the cases that arose under this doctrine,'once a citizen always a citizen.' For instance, German emigrating to this country and afterwards returning to Germany were drawn into the German Army, under this doctrine of once acitizen always a citizen. Citizenship could not be cast off or abandoned, but it could not be assumed without the consent of the sovereignty. The United States Congress has provided meaas whereby a citizen of a foreign country may become a citizen of the United States. Domicile is a matter of choice, except as it is imposed at birth.

1 Wall. Jr. 265
1 Law Rept. 441
4 Am. Law Rev. 678

In a certain sense, the domicile may also determine the civil status. The distinction between domicile and citizenship is very interestingly pointed out in the case above referred to, in 1 Wall. Jr. 265. Brown was born in the Colonoy of Penn. while it was in allegiance to the British Crown and hence he was politically speaking a British subject. On the breaking out of the Revolutionary War Brown left the Colony and went to reside in England where he remained until the cessation of activities. He remained in England eight years. His political status was that of a British subject, but he has acquired no permanent abode after leaving Penn and his domicile of origin was said to be in Penn. After the establishment of independence Penn held that his domicile was still in the State of Penn.

It must be appranet that there is in this country several kinds of allegiance. In the first place a person has a national domicile by reason of his residence within the United States. He has another domicile in somestate or territory, which may be termed his quasi national domicile. And he is domiciled in some political subdivision as a city, town or hamlet. Either one of these, according to the fact, is his local or municipal domicile. All of these are entirely consistent with each other.

All persons sui juris may change their domicile at pleasure. To affect such a change there must be aconcurrence of intention and of fact. The election or intention assumes, first, the capacity to choose, secondly, the freedom to choose, lastly, an actual choice. The intention must be actually and fully carried out. The domicile

continues until a new domicile has been acquired. The right of every person to change his domicile is fundamental in the Roman law and British, American and Continental jurists, with the possible exception of the French, acknowledge the right of a person to change his domicile.

Law Rept. Chan. Div. 257
39 N.J. Equity 279
5 Pa. St. 71
78 Ill. 160
11 La. Ann. 175
12 La. Ann. 190
Wharton's International Law. 198-9.

CAPACITY TO CHOOSE.

No one can affect a change of domicile unless he is legally competent to choose a new. An infant, a married woman or a person of unsound mind is not legally competent to make such a choice. The law conclusively presumes that an infant does not possess the necessary discretion to affect a choice. The domicile of a married woman merges in that of her husband and so continues during the existence of the married relation. An insane person is without discretion in fact.

Jacob on Domicile, 209-16.

There is one exception to the last proposition. When a woman has separated from her husband for cause, for the purpose of giving the court jurisdiction, she may acquire a domicile away from, and distinct and separate from that of her husband.

FREEDOM OF CHOICE.

When I refer to freedom of choice, I have reference to the mental operation by which some place of abode is determined upon, independent of the act by which the determination is manifested. There is no way ofproving such determination except by outward manifestations. I may determine to change my residence and make Chicago my permanent abode. So far what is done is a mere mental act. I am conscious ofit alone. If a person's domicile is in question that person can go upon the stand and testify or may be compelled to testify in regard to his intention in regard to the matter. But in mostof these cases the person whose domicile is in question is gone, is dead; what was in fact his intention is the subject of inference or deduction upon the facts which are given and which are very misleading. The fact that a person has formany years resided in a certain place does not of itself tend to prove that he is domiciled there. As a general rule we know people are not in prison as a matter of choice. But I do know that in my own city a great number of people have come to the house of correction and have asked to be sent to prison during the winter months. If a person is sent up under those circumstances, that prison becomes his free choice of a place of abode and he may conclude to stay there indefinitely. I have read of a case where a paroled convict came

back to prison and asked to be taken back forthe remainder of his days as the struggle with the world was too hard.

In Jacob on Domicile 272-4, there is a discussion as to whether transportation for life to a penal colony, such as Australia, will change a person's domicile. It has been held that it di, but such a decision is not consonant with the nature of domicile.

I call your attention to nother case,
39 Ala. 452.

In this case a minor born in Germany left his home and came to Alabama with the intention of returning when he reached his majority. He was prevented from returning by the outbreak of the War of Secession and he was drafted into the Confederate Army and obtained his discharge upon the ground that he was not domiciled in Alabama although living there. He was there against his will. It was held that he was not subject to service in the confederate army.

24 Iowa 204

In this case a gentleman living in Iowa before the outbreak of the Civil War had a debtor living in Texas. He was in need of this money very much so he went down South to see his debtor. While there the Civil War broke out and he was compelled, against his will to remain within the confederate lines for over four years. This gentleman also had creditors living in Iowa who were also in need of their money and they brought suit against him and as they could not personal service against him a copy of the service was left at his place of abode, that his the place where he resided before he left for the South. His property was sold at a very great sacrifice to satisfy the judgment. After the war the gentleman returned to Iowa and began a suit to attack the validity of these proceedings. It was held by the court of Iowa that his original domicile adhered and that the execution and sale of his property was valid.

I have said that the party must actually intend to change his domicile; it nowbecomes important to distinguish between intention and motive. The intention is important; the motive is entirely immaterial. When the intention is present, it makes no difference what motive underlies it. The motive may have some extrinsic value as bearing upon the question of intention, but the motive as the ultimate thing is entirely irrelevant and has nothing to do with the case.

The Federal Courts have jurisdiction over controversies arising between citizens of different states. I am a state of Michigan and want to bring an action against a citizen of Michigan in the federal courts. I go to Chicago and establish my residence there for no other reason than that I may prosecute my claim in the Federal Courts. It makes no difference why I went to Chicago if I went there with the intention of making it my permanent abode. Chicago will be my domicile regardless of the intent and purpose with which I went there.

This question frequently arises in matters of taxation of personal property.

138 Mich. 372

A man has a right to change his domicile for any reason satisfactory to himself, and in determining whether there has been such a change from one place to another, the test is whether he has in fact removed his home to the latter place with the intention of making it his residence. If he has he looses the old domicile and acquires a new domicile. The law does not inquire into the motives that induced him to make the change.

149 U.S. 315
8 Fed. Rep. 548
10 Fed. Rep. 412
117 U.S. 123

This question assumes very great importance in divorce litigation. A very familiar case is that of Mollineau who was indicted for murder and was sentenced to be electrocuted and upon a new trial being granted was acquitted. And thereupon his wife went to the state of Arizona and began divorce proceedings. That court had no jurisdiction unless Mrs. Mollineau intended to make Arizona her home. If she did intend to make Arizona her home, why did she intend to make it her home? Does her motive militate against the jurisdiction of the court. Not at all. Was it the intention of Mrs. Mollineau to remain in Arizona after she obtained the divorce or did she intend upon obtaining a decree for divorce in Arizona to remove to some other state to reside? If she went to Arizona merely for the purpose of obtaining a divorce and having obtained it to abandon that place as her place of residence and go to some other state, then that court would not acquire jurisdiction and the divorce if she obtained it would not be worth the paper it is written upon.

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Oct. 9, 1903.

L E C T U R E VI

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At the close of the last lecture I was speaking of the freedom of choice. There must be freedom of choice and an actual choice. A person cannot acquire a new domicile unless he actualy intends to abandon his former domicile and to establish himself permanently in another place. The mere intention to abandon one's domicile is not sufficient in itself to change the domicile. Domicile cannot rest in mere intention. There must be an actual choice with an intention then and there to affect a change. A mere accidental or compulsory change of residence will not work a change of domicile. In other words, the change of domicile will not rest in a mere mental act, without any outward manifestation by physical act.

There are decisions, which at first blush would seem to militate against this rule.

2 Bos. & P. 229.

This was a case where a man went to India in the services of the East India Company to make his fortune and if he succeeded to return to his native land. The court said that he had acquired a domicile in India. It was put upon the ground that the East India Co. was a quasi foreign government and a person entering into its service must be deemed to be domiciled within its jurisdiction.

4 Johns. & Scott 616
11 Juris New series 212
13 Law Times, New series, 41

In the case of

9 Moore Priv. Counc. 325,

a young Irishman went to France when about nineteen years of age to complete his education. While he was there the Revolution broke out. He had previously formed an attachmen for a young French girl who, when he was in peril of his life, had aided him to escape. Forty years afterwards he came back to France and looked the lady up and lived with her. He avowed his intention of living there as long as she should live and then returning to Ireland if he survived her. It was held that he had established a domicile in France. He had not adopted this as his permanent abode. He intended to live there as long as this woman lived and no longer. Dr. Lushington, speaking for the Privy Council, said: "It never can be said that residing in a country until the death of a person is a temporary residence." With all respect to Dr. Lushington, that is all bosh. She was a pretty old girl at that time and she may have been ill.

3 H. & C. 374

In this case, an English woman sister had married a German, and she went to live in Germany during the life of her sister. It did not appear what her intention was in case of her sister's death. It was held that her domicile of origin continued.

Upon principle these cases cannot be harmonized. The American cases are not at all harmonious. You will find all these cases collected in a note by Jacob in his book on Domicile, sect. 170, note 1.

The case of,

7 Gray 299 was a rather extraordinary case. This case is not one involving the question of domicile it seems to me, but the Supreme Court of Mass. thought differently. I think it simply involved the right to vote independent of the question of domicile. I may be wrong and the court is probably right. The plaintiff was domiciled in Fall River, Mass. He was obliged to give up the residence which he had rented and was unable to find another suitable for his family. He removed with his family just across the state line into Rhode Island. He gave notice to the estimators of both towns that his removal was only temporary and he actually did return to Fall River in thirteen months. An election was held in Fall River and he claimed his right to vote in Mass. although he was actually residing in the state of Rhode Island. He claimed the right to vote because he never intended to make Rhode Island his home and always intended to return to Mass, and upon his intention to return he rested his right to vote. The Supreme Court said the right to vote cannot rest in mere intention.

The intention having been formed, in order to establish this domicile it is necessary that the intention should be carried out. The old domicile is not lost until the intention has been fully accomplished. There must be a concurrence of intention and fact.

14 How. 400
21 Wall. 350
1 Wall. 274

This seems to be the American doctrine, and it is the English doctrine except there the doctrine of origin was held to revert the instant the acquired domicile is abandoned, although a new domicile has not been acquired. It is a maxim of the law of domicile that the domicile of origin adheres strictly and adheres closely.

The American doctrine seems to be that the domicile of origin does not revert unless it is the intention of the party that it should revert and the acquired domicile adheres until the new domicile has been acquired.

Wharton in his,

Conflict of Laws, Sec. 58,

says: "Where a person abandons his domicile, starts for a new one and dies on the way, the place of his destination is the place of his domicile." I do not agree with Dr. Wharton and do not think he has any authority upon which to base such a statement. The American cases seem to be all the other way.

23 Pick. 170
1 Medcalf 142
132 Mass. 89.

In this last case a man residing in Boston left that city with his family to reside in Europe for an indefinite time with the intention of never returning to Boston to make it his residence, but with a view to making some other state his permanent place of abode. While in Europe he did fix upon a place of residence in another state, but he remained in Europe several years longer. The Court held that he retained his domicile in Boston for the purposes of taxation until the place chosen as a domicile had been actually reached.

1 Brad. (N.Y.) 127

Deceased had left Scotland and was on her way to Canaday which she intended to make her permanent home. She died in New York before she reached her destination. It was held that her Scottish domidle continued until her death.

The English authorities are not at all uniform.

25 Law Journal 746.

In this case the testator who had a Scottish domicil of origin acquired a domicil in India where he resided for twenty years. He then started to return to England and died on the way. His intention of returning to England for the purpose of making it his home was rather obscure, but the court dismissed that question with the remark that inasmuch as he had not reached England his acquired domicile continued. That case seems to be against the general doctrine in England.

Dicey, Law of Domidle, 84.

The general intention to make a state one's domicile seems sufficient. It is not necessary that any particular place should be chosen within the state as a domicile.

75 Fed. Rep. 321.

A had a domicile in Tenn.; he went to Texas with the intention of makin Texas his home. He had in mind no particular place in Texas in which he intended to reside. It was held that Texas became his domicile immediately that he reached it. Texas became his quasi national domicile.

9 Supt. Court, Jurist 43-45.
Jacobs, Sec. 123
Dicey, 91-93.

Domicile when once chosen continues until a new one has been acquired. The general doctrine is well settled, but subject to exceptions.

The English doctrine seemsto be that the domicile of origin reverts the moment the acquired domicile is abandoned. The American cases seem to be the other way.

1 Lowell 237

It was decided that if one intends to abandon his acquired domicile and reacquire the domicile of origin, the latter is acquired immediately the former is abandoned, although the domicile has not been reached.

3 Swab. & T. 349

Here the party intended to leave the acquired domicile and was taken sick before passing the boundary of the state and had to return. It was held that acquired domiciled was retained.

The domicile of origin is that which every person acquires at birth. If the child is legitimate and the father living it is the domicile of the father at the time. If the father is dead, or the child is illegitimate, it is the domicile of the mother at the time of the birth of the child.

This statement of law is easy to make, but it is not always easy in its application. It is one thing to assume a thing is so and another thing to apply it. For instance, in the case of gypsies or vagrants, it may be impossible to show their domicile of origin. Suppose an unknown man is found dead in the city of Ann Arbor and who has about his person a considerable sum of money and papers showing that he was in possession of a large amount of personal property, but there is no evidence about him of his domicile of origin or any other domicile. The Probate Court of Washtenaw County would be called upon to distribute that property according to the laws of the person's domicile. The law indulges in a presumption that prima facie that where a person was born is his domicile. Supoose you cannot prove where he was born. In such a case, the domicile is presumed to be where the party happens to be. But the moment evidence appears to the contrary the presumption is overthrown.

The personal property of a person is taxed where he is domiciled, and it makes a great difference whether it is under the control of a village where the rates are often low, or of a city, where they are generally high. We had a case in Detroit which presented some interesting features on thelaw of domicile. Mr. Geo. Beecher was a resident of a small town in Michigan at the time of his father's death, and went to Detroit to administer his estate. As the estate was quite large, and would take some time to settle it up, he built a large residence in Detroit, and it was sought to tax his personal property there. He went upon the witness stand and testified that he had no intention of remaining in Detroit after the settlement of the estate, but the jury found that he was domiciled in Detroit. The theory of domicile is that it is a matter of intention. The finding of the jury in the case shows the difference between theory and practice.

It is impossible to lay down any definite rule upon the subject. Each case must be determined by its own circumstances. The elements of intention and the varied and often ambigious modes of its manifestation largely increase the difficulty of dealing with this kind of questions in practice.

Remember that the domicile of origin is not, derived from the place of birth, but from the domicile of the father at the time of birth, or from that of the mother if the father is dead or the child illegitimate.

----oOo---- Oct. 9.

LECTURE VII.

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DOMICILE OF INFANTS.

I have already stated to you that in case of the father's death the infant takes the domicile of the mother. The question now arises, when the widow by marrying again changes her domicile to that of her second husband, what effect does it have upon the domicile of the children? She does not by taking them with herm make the domicile of her husabnd the domicile of her children. For example a woman is the mother of three children. At the time of the death of her husabnd they were domiciled in the State of Michigan. At the time of the death of her first husband, his domicile was her domicile. That then was the domicile of the children also. She goes back to the State of New York where she formerly resided with the intention then and there to acquire a domicile. The law imposes the domicile of the mother upon the children. After a lapse of time she marries again. She marries a man domiciled in the State of Michigan. When the mother marries again, she acquires, not a domicile of choice, but a domicile imposed by law upon her on account of the theoretical unity of husband and wife. The domicile of the husband is imposed by law upon the wife by virtue of the marriage and ordinarily her domicile will be imposed upon her children, but inasmuch as this domicile which she acquires by virtue of her marriage may change the law of inheritance with respect to these children the courts say that the domicile of the children acquired before the second marriage of the mother is their domicile and adheres.

112 U.S. 470
2 Bradf. 214

It does not seem competent for the mother to so change the infant's domicile as to interfere with the Laws of Inheritance or otherwise effect the rights of third persons. In Michigan children of the half blood inherit equally with the children of the full blood. In Ohio they do not. And millions of dollars worth of property might be affected if it were competent for the mother by acquiring the domicile of her second husband change the personal status of her children. The law therefore looks to the intent. A woman may not change the domicile of her infant children whether she marries again or not with the intent and purpose of changing the Laws of Inheritance with respect to their property. This is one of the cases where the logic of the law ceases and justice comes in.

46 Ga. 660
3 Md. 67

Jacobs says that while it might not be competent for the mother to change the domicile of the child for the purpose of changing the laws of inheritance by which the property would be administered, she may change the infant's domicile wholly disconnected from such rights. This is a very peculiar statement indeed, for domicile is nothing more than a legal concept for the purpose of ascertaining a person's legal status. The meaning of domicile and its primary purpose is to establish this very rule of inheritance and administration. What is the use of talking about domicile entirely disconnected from those things for which it was created. I do not know whether you are all familiar with that little book entitled "Alice in Wonderland" in which the author speaks of a wonderful Cheshire Cat with a wonderful grin, which had a wonderful faculty of disappearing altogether but would only leave the grin behind. So it is with this definition or statement of Mr. Jacobs, there is nothing but the grin left behind, everything for which domicile was created is gone.

Suppose both parents are dead, then what becomes of the infant's domicile. You are helped out in the first place by the doctrine of continuance. When a status is once established that status remains until another is established. The father dies, the father's domicile continues to be the infant's domicile until the mother chooses a new one. The mother chooses a new domicile, that domicile becomes the infant's domicile; the mother dies, the domicile of the mother continues as the domicile of the infant until he has attained his majority unless something else intervenes to change the domicile of the infant.

114 U.S. 222

It was held in that case that an infant might, where both parents are dead, with the consent of his guardian, assume the domicile of his grand mother upon the ground that after the death of the fatherand mother the grand father or grandmother were the next of kin and guardian by nature.

But this doctrine was doubted in Louisiana in the case of

19 La. 499.

Whether the domicile of the child may be changed by his guardian is a very much disputed question.

The rights of a statutory guardian are within certain limits recognized in foreign jurisdictions so far as such recognition comports with the interests of the ward. It by no means follows that the guardian may change or transfer the sphere of his activities from the jurisdiction that appointed him. The authority of the state doesnot extend beyond the limits of its territory. It would seem therefore that a Statutory guardian has no power to change the domicile of his Ward. I am speaking now of Statutory Guardians and not Natural or Testamentary Guardians.

You will find that Courts of Justice are unwilling to be bound by strict rules of law in dealing with the person or property of the Ward. The Court is not going to look at the mere technical question of domicile where the substantial rights of the infant are involved and the courts will ordinarily do what is best for the infant to the detriment of a systematic legal system.

5 Paige, 596

It is a right in most states for the father to appoint a Testamentary Guardian of his childfen. He ordinarily has the same power over the children that the father had. He can take the child where he pleases, and change his domicile accordingly.

In this case of 5 of Paige 596, the father comiciled in New York at the time of his death. Before his death he had appointed a testamentary guardian for his children, and directed that they be taken to the state of Ohio. The mother seems to have been entirely ignored. The mother applied for an injuction restraining the guardian from taking the children from her to the state of Ohio. The statutes in the state of New York recognized the right of the father to appoint a testamentary guardian and the rights of the guardian were paramount to those of the mother under the strict letter of the statute. Notwithstanding this the Chancellor granted the injunction. This is an illustration of the old saying that blood is thicker than water. The Chancellor was impressed by the natural claims of the mother and the apparent injustice of removing the children from her to another state. The Chancellor said that he had no doubt of the power of the guardian to take the children to Ohio under ordinary circumstances and that it would require an extraordinary case to justify the court's interference, notwithstanding which he did interfere and enjoin the guardian from taking them away.

52 Barb. 294

The domicile of the wife is merged in that of her husband, and so continues during all its changes during the existence of the maritial relations. This rule springs in the first place from the theoretical unity of husband and wife, the subjection of the latter to the former, and the duty of the wife to make her home with her husband.

Jacobs on Domicile, sec. 209

The law assumes that the wife intends to dwell in the place of her husband's abode. So if married by a ceremony solemnized in good faith, although in fact illegal and the parties live together as husband and wife, she take the domicile of her supposed husband. But mere participation in the marriage ceremony void of legal sanction, will not of itself impose the domicile of the husband upon the wife, when the woman did not change her place of residence after marriage.

12 Mass. 363

Where the marriage is a marriage de jure as well as de facto, then the law imposes upon the wife, by virtue of the marriage, the domicile of her husband. But when the marriage is illegal, although the parties intended it to be legally solemnized, then the domicile of the husband is imposed upon the wife only when a change of residence has been affected by the wife in conformity with such supposed marriage. If they do not live together then there is no change of domicile.

The theoretic unity of husband and wife asserts itself in the fact that the domicile of the wife partakes of herhusband's domicile instantly upon the celebration of the marriage ceremony, even before she arrives at his place of domicile.

The wife so long as there is no legal ground for separation cannot select her own domicile, either with or without the consent of her husband.

But when there is ground for separation she may acquire a domicile independent of her husband for the purpose of giving the court jurisdiction of the divorce question.

Thus far we have considered the general principles of the subject, by which we determine the status of the parties. We will now consider the different classes of persons whose status is determined by domicile. You will remember that there are natural or artificial persons, or to use the language of the Lawyers upon the Continent, -natural persons or juristic persons. These persons may be either citizens, aliens or subjects.

Subjects are those born within the dominon of the King, that is within the allegiance of the Crown of England.

Ordinarily speaking a person born within the territorial limits of a country whether it be a republic, a kingdom or an Empire, is a subject or citizen. But it is not necessarily so. Suppose this country were invaded by an alien army and while here a child should be born in the Camp of the Enemy. That child would not be a citizen of the United states. Why? It was not born within the allegiance or protection of the Government. No such case has arisen in this country. But a case arose in England at an early day where it was held that a child thus born was not a British subject because it was not born within the protection or allegiance of the crown.

7 Coke 18 A.

---oOo--- Oct. 27th, 1903.

L E C T U R E V I I I .

---oOo----

The child of an alien if born within the allegiance a is a subject, if the parents are within the dominon of the King. Children born abroad during a time of rebellion are subjects by statute.

29 Chas., Chapt. 6.

The children of ambassadors born abroad are subjects. Here the doctrine of extra-territorial law comes into play. The ambassador carries his territory with him. The child born in the American legation is born on American soil, and within the allegiance and protection of the United states. This does not extend to envoys or ministers, they have no extra-territoriality.

It was enacted at an early day in England that the King's children wherever born were of the nobility to inherit the crown.

Recently it was enacted,

7 Vict. 66,

that children are British subjects whose parents are temporarily abroad, and are to be considered as natural subjects and capable of inheriting.

We have in this country a great many naturalized citizens.

In England until recently a naturalized subject could not be created except by Act of Parliament. It was considered an act of temendous dignity and importance. The act of making an alien a naturalized subject was one of great moment, quite different from the whoesale methods employed in this country. (I read in the paper the other day that a Judge in New York naturalized 1800 hundred persons in one day) When once created a subject, he was entitled to the same privileges as natural born subjects, except that he could not be a member of the Privy Council, or hold office under grants, etc. An alien could not be admitted as a citizen unless he had been in the country seven years and must have received the sacrament of the Lord's supper within one month before the bringing of his bill.

Great Britain had denizens, who were aliens, born abroad, who received as a matter of grace from the King, letters patent to make him a subject. The denizen might take lands by purchase or devise, but not by inheritance, because his parents had no inheritable bllod, and therefore could not transmit. Issue born before denization could not inherit, but issue born afterwards could.

Natural allegiance is due from all men born within the King's dominon immediately upon their birth.

It is said by Sir Wm. Blackstone in his Commentaries,

Blackstone, p. 370,

to be a debt of gratitude which cannot be altered by time, place or circumstances, nor anything but the united concurrence of the legislature. Allegiance was perpetual according to the common law. Local allegienace is due from the alien and stranger who continues within the King's dominon. It ceases the instant the stranger transfers himself from the Kingdom.

1 Blackstone 370
2 Kent 63-4.

A citizen is defined by the Fourteenth Amendment to the Constitution which provides that all persons born or naturalized in the United states and subject to the jurisdiction thereof are citizens of the United states, and of the states wherein they reside.

Justice Miller says that citizenship in the United states had never before been defined.

When you come to analyze this amendment, you will find that it declares,(1) Who shall be citizens of the United States, and (2) That citizens of the United States are citizens of the respective states. In other words, a person born in the State of Michigan, is a citizen of the United states and a citizen of the state of Michigan. It follows also that a resident in the Territories or District of Columbia can have no citizenship other than citizenship of the United states.

The Constitution recognizes in terms two distinct citizenships:-that of the Nation, and that of the State.

In this connection, and bearing upon the statement made by Justice Miller that citizenship in the United States had never before been defined, I wish to call your attention to the case of,

6 Peters 761.

In that case the declaration averred that a person is a citizen of the United States naturalized in Louisiana and residing there. And the question was whether that was equivalent to an averment that this person was a citizen of the state of La. It was necessary that the declaration should contain such an averment for the reason if the declaration did not allege it the court could not take jurisdiction. The Court decided that this averment was equivalent to alleging that he was a citizen of La. If that be thec orrect view, then the Fourteenth Amendment of the Constitution was in some respects merely declaratory of what the law was before.

Citizenship in the United States can only be acquired in conformity with the National Law. State Citizenship so far as it is defined by the Federal Constitution cannot be modified by state Action. A citizen of the United states and residing

within a state is by virtue of his citizenship in the United states a citizen of the State in which he rsides and it is not competent for a State by legilation or otherwise to deny him that status. But it is competent for a state to create a citizenship outside of that. It has not been done, so far as I know.

Children born in an invading army within the jurisdiction of the United States, the father being an invader, do not become citizens of the United States.

2 Kent 42

Naturalization is the process whereby a subject or citizen of a foreign nation is made a citizen of the United States. The general process of naturalization is pointed out in

US.R.S. par. 2165

The power to frame naturalization laws lies in Congress and is vested by the Federal Constitution.

U.S.Const. Art. 1, par. 4 Sect. 8.

"Congress shall have power to establish an uniform rule of naturalization throughout the United States."

Justice Miller, in his Lectures on the Constitution, says that this power is exclusive. There are no adjudicated cases on the subject.

Justice Miller, Lectures on the Constitution, No. 6, p. 76.

Notwithstanding this citizens have been created by treaties. When we took Alaska we stipulated in the treaty that the people there should become citizens of the United States. It would have been equally competent to have provided by treaty that the Philipinos should become citizens.

It is said that Political allegiance is perpetual, once existing it cannot be shaken off. That is the doctrine of the common law. It was the doctrine in this country until the Legislature stepped in and abolished it. The astonishing thing in connection with this matter is that the judicial department of the government has taken one attitude, and the political department another. The United States of America by its Political Department has always maintained that there is no place for this doctrine of perpetual allegiance in a government like ours. But nowithstanding this, the Judicial Department has adhered to this doctrine right along.

This doctrine of perpetual allegiance was upheld in thecase of,

3 Dall. 133(1795) .

It was held in this case that allegiance creates a tie between the government and the citizen of a contractual nature. As it takes both parties to qualify a contract, therefore a citizen cannot change his allegiance without the consent of the government. When you come to analyse that statement, you

will find that it rests upon a fiction. You know that as a matter of fact, you have never contracted with the government to give allegiance for protection.

This doctrine was carried to an extreme length in the case of

2 Cranch, 82-3,

which is the most interesting and certainly the most startling case in its results of all the cases that I know of. Mr. Williams was at one time an American citizen. He went to France to live and became naturalized and after he had become naturalized he was offered and accepted a commission in the French Army. Mr. Williams was tried for accepting a commission from France and commiting acts of hostility against Great Britain. There was no doubt but that he was at one time a citizen of the United States, but he said that he had become a citizen of France, and so had a right to perform these acts and accept the commission. The Court held that allegiance was perpetual and could not be shaken off. The Court said" Members of a community are bound to each other by a compact which no one party can dissolve without the consent of the other. The court also said that when a foreigner presents himself for naturalization, we do not know and cannot inquire into his former allegiance. Thisstagment is not true, for we not only can inquire, but we do inquire.

Very soon after this decision the question came up in two cases:

2 Cranch 64
7 Wheaton 283

Finally we have the question squarely presented in the case of,

3 Peters 242.

In this case a woman who was born in Charlestown, S.C. married a British officer during a temporary occupancy of the city by the British during the War of 1812, and after the cessation of hostilities she went with her husband to live in England. Subsequently there arose a question in the United States touching her status as a subject or alien. If she was a subject she could inherit, and if she was not a subject she was not entitled to inherit. It was held that the woman did not by such marriage cease to be a citisen of S. Carolina. The reason given by the court was that no person can by any act of hisown without the consent of the government put of his allegiance and become an alien. Because, the court says, if it were otherwise, then, a woman alien could by marriage become ipso facto a citizen and entitle to be dowered in his estate, which is contrary to law. This is reasoning in a circle, but it is based upon a passage from Coke upon Littleton and however the thing seems to use so learned a man would not reason in a circle.

---oOo----- Oct. 28th, 1903.

L E C T U R E IX.

---oOo---

In 1868 Congress declared the right of expatriation. Until this time the right was not recognized by the Judicial Department of the Government, although the Political Department had always asserted it.

A very interesting series of articles are running through the Century Magazine by Andrew D. White, for many years the Ambassador of theUnited states to Germany at Berlin, in which he tells of his experience in that connection, and some of them are very instructive, and all of them are very funny, so a reading of these articles would be interesting and to some extent profitable.

This question has been discussed from a purely political standpoint in,

Trist, Law of Nations, Vol. I, p. 231.

He says: "That the doctrine of perpetual allegiance finds no countenance in the Law of Nations and is in direct conflict with the incontestable rule of that law."

Mr. Lewis Cass, Secretary of State in 1857, instructed the minister at Berlin that the doctrine of perpetual allegiance is a relic of barbarism which has been disappearing from Christendom during the last century.

As I said before this conflict continued between the judicial and political department until July 27th, 1868, when Congress passed a law declaring the right of expatriation.

England followed suit very soon after and in 1870 the British Parliament passed an act providing for a general naturalization law. This Act of Parliament, among other things, provided that the following persons might renounce their allegiance and elect what political status they shall assume:

(1) Any person who by reason of his having been born within the dominions of her Majesty is a natural born subject, but who is also at the time of his birth under the laws of a foreign state and a subject of such state.

(2) A person born outof the Bristish dominion whose father was a British subject.

It is very strange that there should be such a disparity of views of the Political and Judicial Departments of the U.S. on this question. There is one notable instance in which the Executive Department insisted against the doctrine of perpetual allegiance. A certain Martin Custer was a fugitive from justice of the Austrian government. He came to the United States and declared his intention of becoming a citizen of the United States, but before he became naturalized he went to Smyrna and was there seized by the Austrian Government. An American Man-of-War happened to be in port at that time and he appealed to the captain of the vessel for protection,

and the captain kew he was not an American citizen, but that he had declared his intention of becoming a citizen of the U.S., and he thereupon ordered the surrender of Martin Custer by the Austrian authorities. They refused to surrender him. And the Captain cleared the decks of the gunboat for action, and when the Austrian authorities saw that the captain meant business they surrendered Martin Custer. He was taken aborad the American boat and carried to America. Thereupon diplomatic negotiations arose between the U.S. and Austria in which it was claimed by Austria that the American captain had exceeded his authority and demanded the return of Martin Custer. It was claimed by the U.S. that Martin Custer was taken in Smyrna beyond the territories of Austria and outside the reach of its laws, and upon that point the Austrian Government was willing to accede that the United States had not committed any wrong against it. The real gist of the controversy was overlooked.

. . .

It was a good deal more pleasant to crawl out of a small hole quietly than to fight over this man.

The Supreme Court of Kentucky in the case of,

9 Ky. 178(1839)

held that the doctrine of expatriation was a fundamental American doctrine. And that in the absence of state regulation upon the subject the citizen may abjure his allegiance.

How did they get around the point that it cannot be done without the consent of the government. The Supreme Court of Ky. said we will presume that the government consents.

The right of expatriation was declared by Congress in 1868. Up to that time the decisions of the court were based upon the the common law authority, and the first case which arose under the statute arose in the City of Detroit in the case of

16 Fed. Rep. 211.

At one time the state courts held that there was no liability for injury against the municipality by reason of defective sidewalks, but the federal courts held that there was such a liability, so whever there was such an injury there was a great scramble to get into the Federal Courts. The plaintiff was injured and brought suit in the Federal Court in Detroit claiming to be an alien. What were the facts. The whole case turned upon that quewtion. She had been born in France of French parents and came to this country when she was six or seven years of age. She was never naturalized. In 1863 she married an American citizen and by virtue of such marriage became an American citizen. She lived with him about fourteen years and was then divorced, and married a native of France. The Court held that by her marriage with a Frenchman she became a citizen of France and was an alien and entitled to maintain her action in the Federal Court. The opinon in that case was delivered by Judge Brown, at that time District Judge in Detroit, and how one of the associate Justices of the Supreme Court of the United States.

If a person is not a subject or a citizen, he is an alien. All persons born out of the allegiance of the crown are aliens. In the United States, everybody is an alien who is born out of the jurisdiction and allegiance of the United States.

At Common Law an alien could take, but not hold land. The King could take them from him. The reason being that utherwise the country might become subject to foreign influence, and also as a punishment for his presumption.

1 Black. 372.

Such laws as that are very largely the result of public sentiment. In most of the states of the union these disabilities have been wiped out by statute, and now there is considerable discussion whether or not they shall not be reinstated. But because they have been wiped out by statute it is not right to consider they have no place in the administration of justice, because they have. It was not very many years ago that this ancient doctrine that an alien cannot hold lands was invoked and enforced in the State of Michigan. The old doctrine was that an alien might not acquire title to real property by descent or mere operation of law. He had no inheritable blood. Neither could he take by curtesy or dower. You will find this case in,

21 Mich. 24
22 Mich. 322
25 Mich. 303

The same case came up three times. The case is certainly interesting as a matter of history of this state and it is certainly interesting outside of this state as showing the source of this old common law doctrine. It gives some idea of the abstruse legal knowledge that clusters aroud this class of cases. It will also impress upon you that there is nothing obsolete in the law. A gentleman by the name of Roederer owned a large tract of land in what is now the populous portion of Detroit and at the time of the litigation was known as the Roederer farm and was supposed to be worth about a million and one half dollars. A certain Mr. C. who was a wealthyland holder and had the time, money and leisure to look into these things, after some investigation came to the conclusion that the land did not belong to the R. heirs because some of the ancestors through whom they claimed title were aliens and that these alien ancestors departed this life at a time when the common law rule inhibiting aliens from holding lands was in force. If that was so this property would escheat to the State of Michigan or to the Federal Government. Mr. C. was advised by many learned lawyers that the escheat would be to the state of Michigan. Thereupon he applied to the Board of Escheats for a conveyance. The Board of Escheats did not take much stock in his claims and they told him whatever interest the state of Michigan might have in the property, they would sell for three thousand dollars. Mr. C. having acquired this title, brought

an action of ejectment to oust Mr. R. who had been in possession of these lands for some sixty years and had made improvements and paid the taxes thereon. It was held by the court that the person through whom they claimed title was an alien and incapable of transmitting the title to them and that there was an escheat to the state of Michigan. This case was finally carried to the Federal courts, and it is a very interesting and extensive litigation. The briefs of the council are very full and the opinon of the courts very learned.

Suppose a Frenchman and a German make a contract in Brazil and come to this country to sue upon it. Have they the right to come here to do that? The courts say they have no right, but the courts may hear them as a matter of comity.

This question came up in

79 Mich. 333.

Some Philadelphia people made a contract with some New York people to build a railroad along to the Southern shore of Lake Superior from Duluth to Saulte Ste. Marie. The road having been completed, the contractors claimed that there was due them over one million dollars. The railroad company insisted that there was nothing due upon the contract. The work was done in Michigan, but none of the plaintiffs are defendants resided in Michigan. It became apparent to the plaintiffs that it would take three or four years to reach the case if the bill were filed in New York, and they did not thing it would pay to wait that long, so one fine morning there was filed in the office of the County Clerk at Detroit by the lawyer of the plaintiffs against the the persons who constituted the construction committee of the railroad claiming damages to the extent of something over a million dollars. Within one hour after this declaration had been filed and service of procees had been had an appearance was entered and a bill of particulars was demanded, and a bill of particulars was filed within an hour, and within another hour a plea was put in, and the case was brought to issue and a notice of trial was given and the case was put upon the docket. The Circuit Judge when this case came up wanted to know what this case was and how it came there. He asked to the Clerk to bring him the files in the case, and after looking the files over, he discovered just what has been stated, and upon his own motion struck the case from the docket and said he would not try it. He said that the plaintiffs could not make the tax payers of Michigan pay the expenses of their litigation and that they had better go back home and fight it out there. The Judge was authorized by the Board of Auditors to employ counsel and the matter was argued in the Supreme Court. There is a provision of the Constitution that says that citizens of each state shall be

entitled to all the rights, privileges, and immunities of citizens of the several states. The Judge said that he did not propose as a matter of comity to extend such curtesy to the people from Philadelphia. The case was argued with a good deal of spirit on both sides. The Court held the case under advisement for a long time to the surpise of everybody and finally gave an opinon. The court held, Justice Campbell dissenting, that it was the duty of the Judge to entertain the case. A rather startling result I thought. I was the counel which represented the Judge, therefore I thought it was startling. I think it is startling still, for if this doctrine is sound, it means just this: there is nothing to prevent citizens of states where the courts are crowded from coming here and dumping their controversies into our courts and upon our judges to whose pay they do not contribute one farthing.

There is another aspect to this question. There is a provision of the Federal Constitution which provides that the citizens of each state shall be entitled to all the rights, privileges and immunities of citizens of the several states. It is a right privilege or immunity to bring suit. So a citizen of the state of New York has the same right as a citizen of the state of Michigan to bring a suit in the state of Michigan. In this suit there was no such claim made and nothing to show that the plaintiff was a citizen of the United States.

This matter came up in our Supreme Court in the case of,

Great Western R.R. v. Miller, 19 Mich. 315.

This was an action against a foreign corporation by the plaintiff who was a passenger one of the defendant's trains and was put off at some distance from a station contrary to the statute of Canada. The plaintiff lived in Canada and the corporation was over there, but the corporation could be legally found in Michigan and so he began suit in the state of Michigan. And the question was did the Circuit Court for the County of Wayne acquire jurisdiction. The point was not made in the Circuit Court at all and Miller recovered a large judgment against the corporation and the case was taken to the Supreme Court, and here it occured to some lawyer who had more wits than business to ask the corporation why they did not make the point that the plaintiff should have begun his litigation in Canada. The argument thus suggested was made orally and and Judge Campbell held that where the parties are non-residents and the trespass is committed abroad, the right of action in our courts can only be claimed as a matter of comity and they are not compellable to act in such a case.

49 N.Y. 303 15 Mass. 354 16 Pac. Rep____
54 Barb. 31 79 Mich. 33
Dicey Private International Law 205-6-61

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Oct. 28, 1903.

LECTURE X.

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ALIEN ENEMIES

A person may be an alien enemy in fact, or by operation of law. Somestimes the law imposes upon a person and his property, the character of an alien enemy.

(1) An alien enemy in fact is one who owes allegiance to an adverse belligerent. Formerly these persons were treated as prisoners of war; their lives were forfeited; they were sold into slavery; and they were at the mercy of the captor. These things are not so now. The most severe treatment of the alien enemy at the present time is to require him to leave the country within a certain time.

The enemy's property in the country at the breaking out of war was liable to confiscation. This right exists to-day although we do not exercise it. In this country, however, it has been held that the right cannot be exercised except in conformity with an act of Congress.

The power to declare war is vested in Congress, so that when Congress has declared war, a state of war exists, and it was contended by the government at an early day, and Mr. Justice Story so held that when a state of war exists, the country may do that which is usual and necessary for the prosecution of the war, and that confiscation of the enemy's property is a necessary incident of war, but the majority of the supreme Court did not agree with that opinon.

8 Cranch, 110

This case grew out of the War of 1812 between the United States and Great Britain.

1 Gall. 563
1 Newbury Admiralty 352
5 Blatch. 231-237

It has been held that this right to confiscate the alien enemy's property does not extend to shares held by one government or its subjects in the public debt of the other. If Great Britain and the United states were at war, bonds of one country could not be confiscated by the other. It would be considered a great breach of faith and would injure the credit of the country so doing it. It was suggested by some people ignorant of public law, during the late War with Spain, and before that when war was imminent with Great Britain during President Cleveland's administration, that Great Britain could not go to war with the United states on account of the large number of bonds held in En land, which we could confiscate. It is beneath the dignity of any nation to indulge in any such thing.

In so doing we would violate every principle of international law and good faith and honesty. We have the physical force, but not the moral right to do so. We are physically and morally too big to indulge in such a thing.

Napoleon was very fertile in all sorts of expedients. He was not restrained by any sense of honor or morals. He was a law unto himself. He suggested to his Minister durin, his wars with Great Britain that if England intended to confiscate English Government bonds if it would not be well to retaliate. His Minister replied that England would not think of doing such a thing, and if she did she would injure herself more than she would her enemies.

Hamilton's Work's, Vol. 7, Letters to Camillus, 18 & 20.

Another question presents itself. How far does the state of hostilities affect the contractual relations of the parties. It does not extinguish the rights of the parties, but merely suspends their right of action. It is restored upon the cessation of hostilities. The statute of Limitations is likewise suspended during hostilities.

Wheaton, in his Public Int. Law says that for a half a century prior to the French Revolution, there was no instance of the confiscation of public debt, with the single exception of the Silesian War in 1753. Silesia was in debt to Prussia and this debt was held in Great Britain. And when Frederick the Great got in trouble with Great Britain he simply confiscated the debt. But when peace was restored he had to acknowledge that debt and paid it.

Tuttle's History of Prussia, Vol. 2, pp. 183-7; Vol. 3, pp. 184-256.

These are the only two instances in which confiscation of debts was every attempted or suggested. Napoleon suggested it and Frederick the Great attempted it. The public opinon of Christendom would not tolerate such a thing.

An alien enemy may not bring suit, but if we permit him to reside here during hostilities then we relieve him, for the purposes of that case, of the character of an alien enemy, and his personal property is entitled to protection, and he may bring suit. So that the Spaniards who were alien enemies and might have been compelled to leave the country, so long as they were permitted to reside here, they were accorded the rights of citizens to prosecute a suit at law.

It was so held in,

1 Lord Raymond, 282
10 Johns. 69
6 Binney 241

So the rule as to an alien enemy being unable to maintain suit applies only to alien enemies not residing with us.

The rule that an alien enemy may not prosecute a suit is very well illustrated in the case of,

11 Wall. 259.

This case shows how far prejudice may be carried in the case of war.

In this case the United states had filed a libel in the District Court to declare a forefeiture and sale of defendant's personal property.

The defendant was a Mr. McVey and it was contended that he had suffered a forfeiture because he was a rebel and had adhered to the Confederate Government. This was a proceeding in rem. In such an action the government does not proceed against any person. The government proceeds against the thing. In this case the thing was stock in a corporation. In such a case public notice is given of the proceeding, and all persons who claim any right, title or interest in the thing are entitled to come in and defend their claim. McVey came in and set up his claim to this property. The Attorney General for the United States came in and made a motion that the appearance of McVey be stricken from the files upon the ground that the defendant was an alien enemy, and was not entitled to appear in court. Just as if that was a reason why a man should not be allowed to defend hisproperty which the government seeks to take away from him. The motion was granted. The defendant rbought a writ of error to the Supreme Court , and it was here objected that he could not do so, as bringing a writ of error was the brining of a new suit, and he had no right as an alien enemy to bring a suit in the courts of this country. The Supreme Court said that while a writ of error was technically a new suit, still in its essence it was a means of defense, and anybody cited into court had a right to show cause why his property should not be confiscated. Justice Swayne in delivering the opinon of the court said among other things, that whatever may be the extent of an alien enemy's right to sue in the courts of a hostile country, it is clear that he is liable to be sued, and that carried with it the right to use all the means and appliances of defense.

Executory contracts with an alien enemy or even with a neutral if they cannot be performed except in the way of commercial intercourse with an alien enemy are avoided by a declaration of war.

72 U.S. 377
7 Ellis & Black. 763

A citizen or neutral becomes an alien enemy by operation of law or is treated as an alien enemy if he continues to reside in the enemy country after declaration of war and the opening of hostilities. The Spaniards who remained within our borders after the declaration of war became with respect to his country an alien enemy and his property wherever found was subject to confiscation. This character of alien enemy is impressed upon the property of the citizen who remains in the enemy country. This doctrine is largely the result of necessity. It is assumed that all persons residing in the enemy country are enemies, and all persons residing in our country are friends. The Court has neither the time or the

disposition to inquire as to the state of heart of the individual affected.

The Venus, 8 Cranch, 253.

A british subject had become a naturalized citizen of the United States, and after having become thus naturalized he went back to England and there engaged in trade. After the declaration of war between Great Britain and the United states, but before the fact could have been known in England, his vessel laden with goods, sone of which was the property of American citizens, sailed from Liverpool for New York. While his vessel thus laden was on its way from Liverpool to New York, she was captured by theUnited states Privateer Douglas and taken to Boston, and the vessel and cargo was condemned as lawful prize. He was domiciled in the enemy country and continued to reside there after the declaration of war and when his vessel was captured she was engaged in an unlawful enterpize, that is, engaged in trade between the enemy's country and ours.

The same question came up a very few months after in the case of,

The Francis, 8 Cranch, 335.

Mr. Thompson was a native of Scotland, and became a naturalized citizen of theUnited states in 1793. He remained here until 1801. In 1803 he settled in Glasgow where he continued to do business until the declaration of war between the United states and Great Britain in 1812. Upon hearing of the declaration of war, he ceased to do business in Scotland, and devoted his entire time arranging his interests so that he might return to this country. This he finally accomplished in 1813. The ship Francis, having on board a cargo of good of which he owned one third, sailed from Scotland July 18, 1812 for New York. She was captured by an American privateer and taken to New York where the cargo was libelled as enemy's property, and it was held upon the authority of the case of the Venus, 8 Cranch 253, that the property of Thompson was properly condemned as lawful prize. Why was this? It was because Thompson remained in the enemy country after the declaration ofwar. The Supreme Court said we cannot inquire into his mental condition. We do not know why you stayed. It is sufficient for us to know that you did stay, and because you did stay the law impresses upon you the character of an alien enemy.

In the case of,

The St. Lawrence, 9 Cranch, 120

Mr. Pennam purchased goods through an agent in Great Britain some time prior to the declaration of war in 1812. But they were not shipped until late in May, 1813. He claimed it was impossible to make the shipment sooner, but the Court held that the cargo was lawful prize. Justice Story said to permit a

citizen to withdraw goods from the enemy country a long time after war is declared on the pretence of their having been purchased before the war, would lead to much injurious consequences and would hold out strong temptations to every species of fraudulent and illegal traffic with the enemy.

The Freunschaft, 4 Wheat. 105.

A london firm composed of British subjects, and the claimant was a native of Lisbon, Portugal, and domiciled there, although doing business and established in London, shipped goods at the risk of and on account of the Lisbon partner. The cargo and vessel was condemned as lawful prize. The Court held that the commercial domicile of the house impressed itself upon the goods, and that they were lawful prize wherever may have been the domicile of the partners. The trade of such a house is deemed a hostile trade.

The Prize Cases. 2 Black(U.S.C.C.) 635)

These cases present all the features pertaining to the law of prizes in war. Mr. Justice Grier, speakingfor the Court, puts the question, "What is included in the term "enemy's property"? That covers the whole ground. If it is enemy's property it is liable to be seized, if it is not enemy's property it is not liable to seizure. He ask," Is the property of all persons residing within the territory of the states now in rebellion captured on the high seas to be treated as enemy's property, whether the owner be in arms against the government or not?" He says, "Suppose the person is kept within the enemy's country against his will, shall his property be captued?" He then answers the question, "The right of one belligerent by direct force, not only to coerce, but to cripple the resources of the other by seizure and capture, is the necessary result of war. The commerce is called the sinews of war, and the belligerents have a right to cut these sinews when found on the high seas. All persons residing within the territory whose property may be used to increase the revenues of the hostile power are lieable to be treated as enemies, though not foreigners."

U.S. v. Mrs. Alexander, 2 Wall. 424.

In this case the cotton crop of Mrs. Alexander had been harvested during the occupation by the union troops. They were afterwards forced to withdraw by the hostile forces, and upon regaining the country, confiscated the cotton. It was said that she was a Loyal Union woman. The Court held that it could not inquire as to whether she was loyal or not. The Court cannot inquire into the personal disposition of the inhhabitants of the territory. The matter must be governed by the principles of public law, applicable alike to civil and international wars, that all people in each state or district in insurrection must be regarded as enemies until by the act of the executive or the legislature that relation is changed.

5 Wall. 370 6 Wall. 263
5 Wall 377

----ooo----- Nov. 3rd, 1903.

L E C T U R E XI.

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J U R I S T I C P E R S O N S

FOREIGH CORPORATIONS.

A foreign corporation is an artificial being, invisible, intangible, and existing only in contemplation of law, created by or under the law of the territory other than that in which it operates.

A corporation created by or under an act of Congress is not a foreign corporation, because the act under which it is formed is the law of the sovereignty in which it operates, wherever it may be in the United States.

91 U.S. 29
98 Pa. St. 569

A foreign corporation has no legal statuts except such as is granted to it by the comity of the state. This is true in England and would be universally true in this country except for the Federal Constitution and acts of Congress.

Where a corporation is employed by the government, it may not be excluded from a state. Suppose the exigencies of the government require the employment of foreign ship builders to build a battleship. Then it would not be competent for any state to say that the corporation could not do business within its borders.

32 Fed. Rep. 14

125 U.S. 101

Where the business of a corporation is strictly interstate or foreign commerce, the corporation has a right to do business any where.

so held in,

96 U.S. 1
125 U.S. 181

These exceptions are peculiar to this country and grow out of the Constitution and legislation thereunder. I shall not discuss these exceptions because they belong to the domain of Constitutional Law.

By the comity of the state, the existence and capacity of the foreign corporation is now recognized, unless the laws of the state positively forbid such recognition, or the policy of the state is repugnant to such recognition.

I have said that a foreign corporation is an artificial being. You under stand that while a corporation is an artificial being it is essentially an organization of individuals.

When the law says a corporation is an artificial being it indulges in a fiction, using the language of Mr. Morawetz. For the purpose of this discussion I shall not consider a corporation as an association of individuals, but as an artificial being, the creature of the law. For some purpose the law does not know anything about its artificial being,--its technical entity. For some purposes the law penetrates this legal fiction and treates the corporation as it is,-an association of individuals. In the case of foreign corporations the courts treat it only as an artificial being, and not as an organization of persons. It is plain, therefore, that a foreign corporation has no legal status except that which is given it by state comity, for the reason that a creature of the law has no more extraterritorial force than the law itself. It is said to exist as a matter of grace and that it may not do business except upon such condition and restrictions as the state may impose. It is competent forthe state to exclude it altogether.

When it is said that a foreign corporation exists simply as a matter of grace and as a matter of comity, this is simply meant, that it is within the power of the state to exclude the corporation altogether within the limitations I have named.

The comity that recognizes the legal status of the foreign corporation is always consistent with the policy and law of the state. When therefore the laws of the state in terms, or by reason of necessary implication forbid the existence of the foreign corporation it is clear that there is no room for such recognition, and in the absence of such laws it is not always easy to determine whether public policy demands or forbids recognition. The law seems to be that the mere want of power to create such an organization in the state does not prevent the recognition of such a foreign corporation.

100 U.S. 55

The was an action of ejectment. The plaintiff claimed title to lands in Colorado through a foreign corporation. If the foreign corporation had a right to act within the jurisdiction, it could take title and transfer it to the plaintiff and not otherwise. The defendant claimed that the foreign corporation had no right to hold or convey property for the reason that the laws of Colorado did not authorize the formation of a corporation for the purpose for which this corporation was organized. The state of Colorado was unwilling to allow a domestic corporation to exist for the purpose for which this foreign corporation claimed to exist, it was therefore contended that the policy or law had been declared upon that subject, and that declaration was against the foreign corporation doing business in Colorado. The Court overruled that contention, and said that the answer was found in the

general comity, which in the absence of positive directions to the contrary obtains throughout the states and territories of the United States, by which a corporation organized in one state or territory are permitted to carry on their business in anotherstate or territory and to acquire and hold and transfer property as individuals. If the law or policy of the state forbid such corporation doing business, it must be expressed in some affirmative way. The legislature must say that the corporation cannot exist here, just as in the case of a domestic corporation it must say that its charter is repealed. It cannot be inferred from the fact that the legislature has not made provision for the formation of similar corporations be formed within the state.

101 U.S. 352
35 Ohio St. 158

In this last case, the corporation had been formed under the laws of the state of Kentucky, which imposes no individual liability upon the stock holders. They sought to do business in Ohio. No Ohio corporation could do business in Ohio unless the stock holders were individually liable. It was argued that it was contrary to the public policy of the state of Ohio for such a corporation to do business in the state without individual liability of stock holders. If the law did not permit a domestic corporation to do business within the state without such individual liability, a fortiori, it would not permit a foreign corporation to come in and do business without this liability of stock holders. The court overruled the contention, and said, comity permits them to come in, and you cannot show there is any public policy against it unless you find a statute, and when you find a statute, then you can say that public policy forbids it. I would rather say that the statute forbids it.

15 S.W. 505

In this case a corporation was formed under the laws of Iowa to do a general mercantile business. It had agents in the state of Texas. There was a law in Texas permitting the formation of this kind of corporation, but this law was repealed. The Supreme Court of Texas held that the enactment of a law permitting the formation of such a corporation and its subsequent repeal was indicative of a public policy not to allow such corporations to be formed in Texas, and to exclude foreign corporations for that purpose. In this case the particular act sought to be done by the corporation was not in itself illegal. The question was whether it could be done by a corporation as such.

A foreign corporation is domiciled in the jurisdiction that gave it life. A corporation organized under the laws of the state of Michigan is domiciled in Michigan. When I say that it is domiciled in the state of Michigan, I mean nothing more than that its legal relations are determined by the laws

of the state of Michigan.

109 U.S. 563

Its legal status, so far as it is recognized by the comity of the states, isestablished by the law of its domicile, hence its powers and status are discovered in:

(1) Its constating instruments;
(2) The general law of the corporate domicile;
(3) The principles of comity, and the limitations imposed upon the recognition and enforcement of foreign law in the local jurisdiction;
(4) Public policy of the local sovereignty;
(5) Express statutory regulations which the local sovereignty has imposed upon foreign corporations.

By the term 'constating instruments' I mean all the documents or collection of documents that fix the constitution of any corporation. These are various sorts. They include the charter, legislative enactments, articles of association, and others of similar character. The term covers all documents public or private, which evidence the existence of the corporation.

The legal status of a foreign corporation is determined by the law of its domicile. When not prohibited by public policy, the state recognizes the foreign corporation as an artificial being with the corporate powers conferred upon it by the law of its domicile. The state recognizes it as an artificial being endowed with the powers, privileges and franchises which it possesses in its domicile. So if it is not properly organized as a corporation, so that it is not a corporation under the law of its domicile, it is not a corporation here. If it has no powers in its domicile it has no powers here. If it is not a coporation de facto or de jure in its domicile, it is not a corporation anywhere.

6 Kans. 243

An act had been passed by the Legislature of Pa. creating corporations, and providing that these corporations might do business anywhere except in the state of Penn. The Court said that as it is not a corporation in Pennsylvania, it is not a coporation anywhere else. "No rule of comity will allow one state to spawn coporations and send them forth to other states to do business there. The only territory in the world over which the state has any control and in which it can authorize a corporation to do business is closed to this corporation. Its attempt to authorize the corporation to do business elsewhere is ultra vires, illegal and void."

For the purpose of determining whether a thing is a corporation or whether it is not, you must look to the powers it possesses, and not at the name that is given it.

10 Wall. 566

----oOo----- Nov. 2nd. 1903.

L E C T U R E XII.

----oOo----

10 Wall. 566

In this case a Liverpool Insurance Co. was doing business in Mass. The statute of Mass. imposed a heavy tax on all foreign corporations. And they sought to levy a tax on this corporation. It sought to avoid the tax on the ground that it was not a corporation. It said your law is all right, but we are not bound by it, because we are not a corporation. We are a joint stock company created by the English Parliament. And the act which created us says in terms that we are not to be deemed to be a corporation. The Supreme Court said you have all the powers and adjuncts of a corporation therefore you are a corporation no matter if the English Parliament says you are not a corporation.

I have said that the powers of the corporation are determined by the constating instruments. These are the laws of the corporation's being, without which it cannot exist. They accompany the corporation every where, and enither itself nor any foreign power can relieve the coporation of them. In Michigan these instruments include the act of the Lesgislature under which the copporation is formed, the greater part of the articles of association under which the promoters agree to form the corporation under the act. If there is anything in the articles that contravenes the act under which they purport to organize, that part is void. I xxx

The corporation may not engage in business beyond the scope of its powers, and conversely it may exercise all of its powers, except as the policy of the state forbids it.

10 Mo. 559
2 Doug. 230
11 Hump. 1
25 Mich. 224

In the last case, an Indiana Railroad corporation took a conveyance of land in the state of Michigan, and in this case it became iportant to inquire whether it was competent to do so. The question was answered in the affirmative.

(1) Because by the law of its domicile the corporation would have the power to take and hold land.

(2) There was no law in the state of Michigan that prohibited a foreign corporation from taking land in Michigan. Therefore the comity of the state permitted the Indiana corporation to take and hold lands.

I want you to read this case. It is in Dwyer's Book on Leading Cases. It was an action involving title to land. A party claimed title to real estate through a cor oration

and it was claimed that this corporation had no authority to take lands and as it had no authority to take lands, it did not have the power to transmit the title. Judge Christiancy held that this corporation was by the comity of the state permitted to do business and inasmuch as there was no law which inhibited the corporation from doing what it could do by the law of its domicile, the doing of the thing in question was valid.

In some of the states, the right of corporations to take and hold lands is limited. In other states this limit is also extended to foreign corporations. Therefore you must ascertain if the corporation would have such power at home, and if the question is answered in the affirmative, you ask whether there is anything in the law or policy of the state that prohibits the exercise of this power by a foreign corporation. If the first question is answered affirmatively, and the second negatively, the corporation has the right to hold land.

51 Mich. 145.

The Diamond Match Co. a Delaware corporation wanted to examine the record in the office of the Register of Deeds. The Register of Deeds refused to allow it access to them. Mandamus was brought against him, and the Court found that the corporation had no power to hold property, and therefore had no business to look up titles, and refused the writ of Mandamus.

15 Ohio St. 537

The question in this case came up in this way: The American Bible Society claimed title to land under a will. The New York Statute of Wills declared that no devise of real estate to a corporation shall be valid unless such corporation is expressly authorized to take by devise. This was a New York Coporation and sought to take lands in Ohio by devise. This corporation was not expressly authorized to take land by devise. And because there was no statute in Ohio authorizing the corporation to take by devise, and inasmuch as the corporation could not take in New York, it was held it could not take in Ohio. This seems to be an extension of the doctrine to its utmost limits.

The contrary was announced in,

72 Ill. 51

Here the same question was raised. The supreme Court of Illinois declined to follow the Ohio decision. It said it was a question of statutory construction. Was this New York statute for the purpose of limiting the corporation generally, or was it a mere enactment affecting the making of wills in New York. It held that the latter was the true purpose of the act, and allowed the corporation to take.

The doctrine I have announced is subject to the further

limitation that a person dealing with a foreign corporation, in good faith, is not affected by any limitations upon the general powers of the corporation to do business.

So held in,

98 N.Y. 553
19 N.Y. 207

Here a corporation was formed under the laws of the state of Indiana, and while it had the general power to issue bonds secured by a mortgage upon its road, it was forbidden to sell these bonds at less than par. The plaintiff purchased these bonds. It was held that the plaintiff who had purchased these bonds in good faith and without knowledge of the prohibition acquired a good title. The Court said it is sufficient to say that the contract was in all respects a New York contract, as the bonds were issued and sold in New York, and the interest and interest are both payable in New York. There is nothing in the law of New York that will render the contract illegal.

The same question came up in Georgia. A connecticut Insurance Co. issued a policy in Ga., and it was held that the company could defend upon the ground that certain limitations imposed in its charter under the general law had not been complied with.

The New York court based its decision upon,

1 Wall. 83

-----oOo----- Nov. 3rd, 1903.

L E C T U R E XIII.

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Assuming that the corporation has certain powers to be exercised, the question is how are these powers to be exercised. It is held that the powers granted a foreign corporation by the law of its domicile are to be exercised solely in accordance with the terms of its grant. Such a statute must be strictly followed.

23 Ill. 579

It was held that where the charter of a bank gave it no authority to take real estate, but directed that it should, in the charter designate some officer of the bank who could take the title for it, a conveyance to the bank was void. In this case the bank could hold property, but it must be done in the way that the statute provided.

74 Texas 474

The power of a corporation to acquire lands involves the power to take. When a statute which is the source of the corporation's powers says it shall take in one way and it shall not take in another, it seems that the method of doing the thing is the essence of the thing.

In this connection it is well to bear in mind that the corporation has powers incidental to its existence, and among them is the power to take, acquire and hold land. These powers may be exercised in a foreign jurisdiction unless prohibited in its constating instruments, the laws of its domicile, or the law or policy of the foreign country.

Suppose a corporation is authorized to take property to the extent of 1000 and it has reached its limit. Someone leaves it some property. Does it take, or does it not take. Suppose it does take land in violation of its charter, whose business is it except the state. The state may interefere. But suppose Smith, who has an interest in the property wishes to inquire. What are his rights? That precise question came up before the Supreme Court of the United States in the case of,

107 N.Y. 174.

It was held that where a corporation has received real property in excess of the power granted it by its charter, no body but the state has the right to challenge the title of the corporation.

The question arose in the famous Cornell College Case, in

111 N.Y. 66

That is a very important case and is a case of historical interest. Cornell University was authroized by its charter

to hold property to the value of three million dollars. Mr. McGraw was a wealthy man, and he had a daughter who inherited a large amount of property. In Cornell University was a Prof. Fiske, who married Miss McGraw. She was anxious to provide for him and the University, so she made an arrangement that if she would will him some two or three hundred thousand dollars he would not contest the will. The rest of her property, which amounted to a large sum, she gave to Cornell University. She then died. Then her husband, surviving her, raised the question of the competency of Cornell University to take this property,-it then holding in excess of three million dollars worth of property. And this case of the 107 U.S. was cited. But the New York Court of Appeals declined to follow this decision, and said that the statute limiting the power of the University did not affect its power to hold land, but affected its power to take land, and therefore Cornell University was incompetent to take this bequest. The case was taken to the Supreme Court of the United States. The federal question in the case was decided adversely to the University and there remained nothing but a question of local law, which the Supreme Court said they could not review. Therefore the case was no reversed by the Supreme Court on account of want of jurisdiction.

An alien at common law could take land, but he could not hold them against the government. This distinction was sought to be raised, that while the state could say that Cornell University could not take these lands, it was not competent for Prof. Fiske to raise the point. But the court said no. That would be so if the statute affected only the power of the corporation to hold land, but the way in which the New York statute was framed it affected the power of the corporation to take, and the land went to the heirs of the deceased.

A corporation is also bound by the general law of its corporate domicile. Any law that affects its powers at its domicile is equally effective and binding upon it and all persons dealing with it outside of its jurisdiction. The powers of a foreign corporation are to be gauged by the general law of its corporate domicile. Every corporation is subject to the law of its corporate domicile. It is not only subject to the laws of its domicile in determining its powers, but it is subject to this law in all respects. Laws for the winding up of a corporation or the vesting of its property in a receiver or other officer are binding upon the creditors and assets of the company in a foreign jurisdiction. ... And such officer is regarded as being the successor of the corporation, and although being a creature of the law and having

the functions of a corporation, his powers may be exercised extraterritorially. So the laws for the winding up of a corporation in Michigan, it being a Michigan Corporation, are binding upon its assets no matter where they are, and upon the creditors of the corporation in every state. If the assets of the Michigan corporation are found in New York, they are subject to the law of Michigan, and the receiver of the corporation appointed by the Michigan court, under the law of Michigan, will take precedence over the New York officer who may have attached them upon a New York process.

103 U.S. 223

All persons dealing with a foreign corporation subjects himself to the laws of its domicile affecting its powers and obligations. Anything done in its domicile by authority of its law which discharges them from liability there, discharges them every where.

109 U.S. 527

The Canada Southern Railway Company is chartered by the Dominion Parliament of Canada. It had authority to build a road from a certain point on the Detroit River near Windsor to a point on the Niagara River. And it was authorized in order to enable it to raise the necessary sums of money to build the road, to issue its bonds. These bonds were issued and placed upon the market. And many of them were sold in the City of New York, and Frederick Gebhart, the defendant in this case bought a lot of these bonds. Like a great many other enterpises, it happened that this enterprize was not a financial success. The Railroad company was unable to earn dividends and consequently was unable to meet its obligations. What did they do? Did they go into bankruptcy? No. The Canadian Parliament passed an act providing that this railroad company might issue new bonds and take up the old bonds by the new at a basis of fifty cents on the dollar. In other words the Canadian Parliament authorized this corporation to repudiate one half of its obligations, that is one half of its bonded obligation, and it did so.

Such a law as that would be unconstitutional in this country, because it would be legislation imparing the obligation of a contract. This law grated on the American sense of justice. Mr. Gebhart was offered these new bonds for his old bonds on the basis of one new bond for two old ones. He declined to accept it. The corporation had an office in New York and property in New York, so he brought an action in the United States Circuit Court in New York to recover his bonds and interest. He recovered. Then, the railroad company took the case to the Supreme Court of the United states, and the judgment of the lower court was reversed. The court holding that inasmuch as this legislation was valid and binding in

Canada where the corporation was domiciled, it was valid everywhere.
So in dealing with the property of a foreign corporation, you must look not only to the state of the law of the corporation's domicile at the time the corporation was brought into being, but you must look to the possibilities of the legislation within that jurisdiction.

99 Fed. Rep. 187

Here was an English corporation, and here was a gentleman who owned stock in it. He borrowed money on that stock and assigned the certificate to the person who loaned him the money as security forthe payment of the debt. This gentleman became indebted to the corporation in the sum of several thousand dollars, which was more than the stock was worth. Byt the laws of England the corporation had a first lien upon this stock for the debt of the stock holders. It had a lien paramount to any other lien. By and by these people who had loaned the money to the stock holder, receiving neither interest or principal, application was made to have this stock transferred to them upon the books of the corporation. The corporation said no. This gentleman owes us several thousand dollars and when that is satisfied we will think about transferring the stock. Thereupon an action was brought. This lien of the corporation was valid in England and the United States Court held that it was valid here.

The power of the corporation is also gauged by the principle of comity. It seems that in the absence of a law permiting it, the power of a foreign corporation extends only to the acts which may be done through the mediation of its agents.

13 Peters

Those acts which must be done by the corporation itself must be performed within the territorial limits of the jurisdiction where it was created. If a corporation is created under the laws of the state of Michigan, the individuals who are the stock holders constitute the corporation and they can only act in the state of Michigan. A meeting of the stock holders can only be had in Michigan where the corporation was created.

It sometimes happens that a corporation exists by virtue of the laws of several different states, as for example the Michigan Central Railway Co. This road extends from Detroit Michigan to Chicago, Illinois, running through three different states. That part of the road which runs through Michigan is organized under the laws of Michigan, and that part which runs through Indiana is organized under the laws of Indiana, and that part which runs through Illinois is incorporated under the laws of Illinois. Here are three distinct corporations that are incorporated to form the Michigan Central Railroad Company. It is incorporated by virtue of the statute of these

different states. That is called consolidation in this country, it would be called amalgamation in England. You have three corporations in one. Where are you going to hold your corporate meetings? The Michigan Central Railroad could hold its corporate meeting in any state in which it is organized. It could hold its meeting in Chicago, Illinois, Michigan or Indiana.

In such a case if you wish to sue the corporation in the federal court the question may present some difficulty. Here is a citizen of Michigan who wishes to sue the Michigan Central Railroad Company in the Federal Court. He cannot sue the company in Michigan because the Michigan Central Ry. is a local corporation in Michigan, and therefore there is no diversity of citizenship to entitle him to bring his action in the Federal Courts. If he goes to the state of Indiana or the state of Illinois, he may sue it there in the Federal Court for the Michigan Central is a citizen of either one of those states through which it runs, and he is a citizen of Michigan, and there the diversity of citizenship exists to entitle him to sue in the Federal Court.

----oOo---- Nov. 4, 1903.

L E C T U R E XIV.

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The powers of a foreign corporation are determined by the public policy of the local sovereignty. It is safe to say that public policy forbids the exercise of any function of sovereignty by any person natural or artificial without its consent. Many acts done by a cor oration may be done by an individual in his natural capacity as of common right. When a thing may be done by any body without the express permission of the state, it is said to be a mtter of common right. When it may not be done without express permission and that permission is given, that permission issaid to be a franchise. You and I can carry on a grocery business or any general mercantile business in our individual capacity, this is a matter of common right, but if you and I should undertake to carry it on as a corporation we would be inhibited from so doing, unless statutory authority to do that thing as a corporation were given. You must distinguish between the right to do a thing and the right to do it as a corporation.

There are two kinds of franchises:

(1) Ordinary Franchise, and;
(3) Prerogative franchise.

An ordinary franchise is the righ to do that which a natural person may do as a matter of right.
But a prerogative franchise is something that a natural person cannot do as a matter of common right. You and I can buy, sell and lease property, but we have no right to appropriate a private citizen's property to our own use. But the power to take property without the will of the owner for public purposes is inherent in every state. It is never exercised by any government without compensating the owner therefor. The Constitution of the United states and the Constitution of the state of Michigan provides that private property shall not be taken for publicuse except on compensation paid therefor. The power is conferred by statute in every state to railroad corporations, acting under certain restrictions to condemn property for the use of the railroad. The New York Central R.R. has this power in New York. Has it that power here? The Public Policy of every state provides that the power to take the property ofprivate citizens shall not be exercised by any foreign corporation unless the power to do so is expressly conferred by the statute of the state in which such power is sought to be exercised. For you see that the exercise of that power is part of the sovereign power and that power cannot be conferred by any power or authority than the state itself.

The prerogative franchises cannot be exercised without the express assent of the sovereignty in which it is sought to be exercised. That is an important exception to the broad rule that a foreign corporation may exercise whatever powers it possesses at its domicile. A foreign corporation can come to this state and exercise the ordinary franchises, but it may not exercise its prerogative franchises here. The New York Central Railway may runs its cars in Michigan, have offices here, and do business, but it cannot condemn lands here.

EXPRESS STATUTORY REGULATIONS.

It is competent for a state to exclude foreign corporations altogether. But that has not been the policy of the states. Instead of excluding them they have imposed conditions under which they may do business within the state. The difficulty in this case is to determine what is doing business within the state. Insurance Companies have been made the object of special legislation in this regard.

It has been held that a contract of insurance of property within this state by a citizen of Indiana with a foreign insurance company made outside of the state payable out of the state was not within a statutory prohibition against foreign corporations doing business within the state. The making of an application of a policy forinsurance within the state and a delivery of the policy there is doing business within the state although it was provided that the loss, if any, should be made payable elswhere.

165 U.S. 578

The statute of California was in substance as follows: That any person, firm or corporation who shall fill out, sign or issue any certificate of insurance under an open marine policy, or shall in any way or manner whatsoever do any act in this state to affect for himself or for another insurance on property within this state in any marine insurance company which has not complied with the laws of this state, shall be xx- subject to a fine of $1000 for each offense.

That being the case, the defendant having a lot of cotton in the state of La. opened negotiations with a Marine Insurance Co. for a policy, that is an open policy, upon that cotton. The Co. issued a policy in accordance with which they agreed to insure this cotton whenever shipped. But it was provided that the policy should not take effect until the Company shall be advised by letter of the shipment. The cotton was shipped and at the same time a letter was deposited in a post office within the state of Calif. advising the company of the shipment, and in virtue of this shipment and in virtue of this letter

in the post office within the state of La. advising the company of the shipment, and in virtue of the shipment and in virtue of the letter deposited in the state of La. and in virtue of the previous agreement there was then and there affected a contract of insurance between the defendant and this Insurance Co. It was made effective immediately upon the mailing of the letter in California. It was contended that the defendant company were guilty of violating the statute of the state of California in that they had done an act whereby insurance was effected in the state of California. The Supeme Court of California so held. The Supreme Court of the United States held the contrary.

What are we going to say when two courts upon this proposition differ so radically as these two learned courts did.

It has been held by the Supreme Court of the United states that an isolated transaction with no purpose of following it up by others is not doing business within a state. So held in,

113 U.S. 727

The right of a foreign corporation to sue, stands upon the same ground as that of a natural person. The converse of this proposition is not true. Foreign corporations may sue, but it is not always true that they may be sued. In the absence of statute upon the subject, it would seem that a foreign corporation may not be sued because the court does not acquire jurisdiction of its person. That is an extremely technical doctrine, but it is logically sound and it flows inexorably inevitably from the nature of a corporation. Justice Holmes has pointed out that the law is not always logical, but it is based upon expediency. That is one of the points of difference existing between the civil and common law. The common law is not a logical system bounded by limited rules as the civil law is. So the Courts of England have held that a foreign corporation established in business there is suable and service may be had upon it by serving the officer or agent of the corporation.

It is not a very logical doctrine, but it is good common sense doctrine. If a state permits a corporation to come in and do business there by its agents, that corporation ought to be liable in courts of justice to the citizens of the state where it does business.

This question came up in the case of,

Common Law Reports(Q.B.) 293.

An American Coporation had a place of business in England. The English Courts held that the foreign corporation was suable, and service may be had upon the officer there.

The prevailing American doctrine does not agree with the English doctrine. The American doctrine is extremely technical. It is logically sound, although I do not think itis as sensible as the English doctrine.

The American doctrine proceeds upon the bald technicality that a foreign corporation resides and therefore can only be found within the territorial limits of the sovereignty to which it owes its existence. That point was squarely ruled upon in the case of

19 Mich. 336

That was an action against a Canadian corporation. Papers were served in Detroit on a gentleman who was the treasurer of the corporation in Canada. He happened to come from Winsdor to petroit and while he was there he was served with process. He was not treasurer of the corporation in Michigan. His office had no extraterritorial force. Having been thus served he appeared specially and pleaded in abatement that this corporation was not organized under the laws of the state of Michigan, that none of its officers resided in the state of Michigan, and that the Treasurer of the defendant corporation was not at the time he was served with process in the state of Michigan on professional business for thecorporation, and he was not authorized to represent the corporation as such officer. To this plea a demurrer was interposed. The demurrer was owerruled. The Michigan supreme court planted itself upon the technical doctrine that a foreign corporation isnot suable outside of its domicile.

There are a great many cases throughout the United states that are in full accord with the doctrine as laid down by the supreme Court of the state of Michigan.

It was thought by some of the profession that the doctrine was too technical and an attempt was made at a later date to get the court to reverse itself, but in the

24 Mich. 58
106 Mich. 248
89 Mich. 22

the doctrine of this case was affirmed, and it is undoubtedly the law of this state.

There are statutes which provide that insurance companies and also any foreign corporation shall be inhibited from doing business in this state unless it will appoint an agent upon whom service may be had in this state. If a person desires to sue a foreign corporation, he writes to the secretary of state and he is advised who the agents are and where they may be found.

A foreign corporation may also be sued by attachment in thisstate.

-----oOo----- Nov. 10, 1903.

LECTURE XV.

----oCo----

This extremely technical doctrine announced in the last lecture has not been universally followed. It has not been accepted in New Hampshire, Texas and Georgia.

9 N.H. 394
41 Ga. 600
4 Kansas 453
1 Fed. Rep. 93

There is an interesting series of decisions in connection with this question and the legislation which these decisions have evoked.

During the civil war acts were passed for the removal of cases from the State to the Federal Courts. There has always been more or less jealousy of the Federal Courts, and it seems that a citizen of another state or of a foreign country, if sued here, would have a right to remove to the Federal Court. The result was that every insurance company that was sued would file a petition to remove the case to the Federal Court, which was very oppresive by increasing the time and expense of litigation. To prevent this, the state said that no insurance company could come here and do business unless it agreed in writing not to remove a case from the state to the federal courts. The companies entered into theagreement bu removed the cases just the same, and the Federal courts held that it was not competent for the companies to oust the Federal Courts of their Jurisdiction. And that agreements not to take a case into a federal court were not valid because contrary to public policy.

20 Wall. 445

That was the beginning of a long controversy in the Courts upon this question.

40 Wis. 94
94 U.S. 535

Here the insurance company removed the case to the Federal Court after agreeing not to do so. Under the statute of the state, the insurance company having violated its agreement the commissioner of insurance revoked its license to do business in that state. The company applied to the Supreme Court for a Writ of Mandamus to compel him to issue the license. This was refused by the Supreme Court of Wisconsin, and the company then applied to theUnited States supreme Court foran injunction against the commissioners revoking the license of those grounds. The injunction was granted by the lower federal court, but was dissolved by the supreme Court holding that while the agreement was void, it was competent for the state to prevent the company the alternative of not removing the case, or stop ing business in the state. You would suppose the question now settled.

121 U.S. 186

The statute of Iowa imposed a penalty upon the insurance agent for violating such an agreement, and the agent was convicted under such a statute. He applied to the Supreme Court of the United States for a writ of habeas corpus, upon the ground that the act was unconstitutional. The supre Court granted the writ.

The law of the domicile of the foreing corporation always determines the rights and liabilities of the stockholders, theirrelation to each other, and to the corporate creditors, and to its dissolution.

The rights and liabilities of shareholders are established and defined by the constating instruments and especially by the charter under which the corporation is formed. The validity of the transfers of stock, etc. depends upon the law of the domicile of the corporation, and you should decline to express an opinon as to thevalidity of the stock of a foreign corporation.

The legal situs of the corporation is at the domicile of thecorporation, and you could only reach it there, with process, at the common law. Justice Curtis makes that prominant in his lectures on the Federal law. He says that itis doubtful whether the framers of the constitution and the judicial act realized the importance of the provision with respect to the citizenship of a corporation. At that time there was in Mass. only one business corporation. The common law knew nothing of a levy upon shares of corporate stock.

Suppose a man owes you a large amountof money, and his property is the shares of a New York corporation. The general rule is that you cannot levy upon them. The situs of the stock is at the domicile of the corporation.

47 Mo. App. 409

In this case, however, it is held that where the foreign corporation does business exclusively outside of the jurisdiction thatcreated it, it acquires such a domicile in the place where it does business, that it corporate stock may be attached there. That may be true in Missouri. But suppose that the stock is levied upon and sold, and the purchaser goes to New York to have the stock transferred to him, what will the New York Courts say touching the validity of the proceeding? Of course the purchaser may be able, in equity, to compel the debtor to make the transfer; but I do not know whether the Court would do that. This decision is the only decision that I know of that militates against the universal application of the rule as I have laid it down.

135 Mass. 132
15 Fed. Rep. 494
3 How. 483
10 Allen 337
71 Mich. 180

FOREIGN EXECUTORS AND ADMINISTRATORS.

Their status is said to be local and temporary. A foreign administrator or executor, is a person appointed in a jurisdiction other than the one in which he assumes to act. Any executor or administrator deriving his authority from a Court other than a Michigan Court, is a foreign executor or administrator in Michigan. Such a person has no legal status here, because the judicial action that is resorted to in the appointment has no extraterritorial force. Of course the executor is named in the will of the testator, but this appointment has no force until the will is proved and probated. It is generally said that the administrator derives his powers from the Court, and the executor from the will. This is to a certain extent true, but neither has any legal standing until his appointment is passed upon by the proper court. You understand that the judgment of a Court has no extraterritorial force. I can issue execution in this county, and send it to any county in the state of Michigan, but if there isproperty of the defendant in the state of Ohio, I cannot take my execution there and levy upon it, nor can I take my judgment to Ohio and have execution issued upon it there.

So the Probate Court decrees that a person is dead, and that a certain person has been appointed to administer his property. The Court of Appeals in New York state holds that if it it has been adjudicated that a person is dead, you cannot prove that he is alive. In all other jurisdictions such an adjudication is not conclusive. Generally it is held that if you show that a person is not dead, you show that the Court did not have jurisdiction over the matter at all, and therefore could render no binding decision upon his property. There is another reason for the foreign executor having no status in law. The real property of a person is subject to the law of its situs. The sovereign is the guardian over all real property within its bounds. You will observe that I speak of the actual situs of the property. You will see later that there is a distinction between the actual and fictittious situs of the property. The situs of personal property is, in contemplation of law, at the domicile of the owner. If I leave my jackknife in New York, its legal situs is in Michigan, but its actual situs is in New York.

So if the administrator or executor is appointed by the Court, he is an officer of the state. He has no extra-territorial power. This question has arisen in the state in many ways.

An administrator appointed in Ohio assumed to make partition of land in Michigan. It was held that he

had no standing as administrator in Michigan.

In this country, it may become necessary, in winding up a large estate, to have Letters of Administration issue in several states. The administration granted where the deceased was domiciled is called the general administration, and if it is granted in other states because there is property or land there, it is called ancillary administration.

You must always distinguish between the powers of the administrator, and of the executor as such, and the powers that may be conferred upon the person named as executor, which are really trust powers conferred by the will. Many powers of trust are conferred upon persons named as executor, which are not regularly a part of the executor's duties. These things so provided for are not done by the party named as executor in his capacity as executor, or administrator, but as trustee. The fact that he is also an executor is an accident that does not affect his legal status as trustee.

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Nov. 9th, 1903.

L E C T U R E XVI.

----oOo-----

At the close of the last lecture, we had just entered upon a discussion of foreign administrators and executors. It is important to bear in mind that an administrator or executor is an officer of the sovereign and will not be permitted as such to exercise his office in another sovereignty.

Walker's Chancery Rep. 200

In this case an administrator appointed in Ohio attempted to make partition of lands in Michigan, and the Michigan Court held that he had no standing in Michigan.

In the,

16 Mich. 50

an action of assumpsit was brought, and a plea of the General Issue was interposed, and then the plaintiff died. Under the statute of this state upon the death of one of the parties the suit may be carried on in the name of his legal representative. That was done in this case. The name of the legal representative was inserted instead of the original plaintiff. But the court held that the action could not be maintained for the reason that the administrator in whose name the suit was sought to be prosecuted was a foreign officer and appointed by a foreign jurisdiction.

30 Mich. 296

In the

55 Mich. 568

this matter was presented in a very queer light or aspect. In that case the owner or mortgagor of lands in Michigan was domiciled in St. Louis, Mo. where he died. In St Louis they have what is known as a Public Administrator. This officer acting without the authority of the court, not only took possession of the deceased party's assets, but sold this mortgage and the assignee had it discharged. In the meantime an administrator had been appointed in Michigan and he undertook to foreclose this mortgage. It was contended that in case of a chose in action the right to receive the money on it was with the man who was domiciled in Missouri and in contemplation of law it was there and if there it came within the jurisdiction of the Missouri administrator. But the Michigan Court held that the appointment of the Michigan administrator superseded the administrator in Missouri. I do not think that the lands in Michigan cut any figure. The mortgage represents the debt

and coupled with that debt is the right of the mortgagee to

look to the mortgage for the settlement of his claim, so when you discharge that debt you discharge the lien. So that the question after all which was presented was a mere indebtedness. A foreign administrator may under some conditions collect a debt in a foreign jurisdiction. The fact that this mortgage was assigned did not have anything to do with the case. The Supreme Court of this state seems to have laid great stress upon the fact that at the time of the sale there was an administrator in this state. I think the whole case depends upon the fact that administration had been issued in Michigan at the time the mortgage was assigned.

There is a case of similar import in,

100 U.S. 491

One would think that a proposition so well settled that an executor or administrator has no extra-territorial force would not come up for application and adjudication before a court of last resort. But it did come up, and came up in

43 Mich.

In that case a bill was filed in this state for an accounting from an administrator appointed in N.Y. The administrator was here and he had money here. It was contended that his liability although arising out of his official act was personal and that Jones, the man, as contradistinguished from Jones, the administrator, ought to account to the citizens domiciled within the jurisdiction. The court said no. This is a matter of administration and belongs to New York and we will not meddle with it.

The question came up again in

31 Mich. 274

In this case there was a general administration granted in Illinois, and an ancillary administrator was appointed in Michigan. The estate was partly land in Illinois. A bill was filed here against the ancillary administrator for an accounting of certain partnership matters between complainant and the deceased party and of certain dealing with a former administrator in this state. The Supreme Court held that if the bill could be maintained, it should be brought against the principal administrator, and not against the ancillary administrator, and that the administration in this state has no authority over lands in Illinois.

I have thus far spoken of executors and administrators indiscriminately. I think that a distinction should be made. The executor gets his title from the will when proved, whereas the administrator gets his title from the action of the court that appoints him.

It is also necessary to distinguish between the authority

vested by the will in the executor as such, and the authority vested in the person named as executor as trustee. The duties of the executor are to collect the assets and pay the debts and legacies of the deceased. When he has done that he has fully discharged his duties as executor. It frequently happens that additional powers are conferred upon the person named as executor. If he exercises those powers, he exercises them, not as executor, but as trustee by virtue of the powers conferred by the will. The powers that belong to the person as executor may not be exercised outside of the jurisdiction in which he was appointed. But the powers vested in him as trustee in contradistinction to those powers vested in him as executor may be exercised anywhere. Therefore in considering the extra-territorial powers of the executor, we must be careful to distinguish those powers which belong to him as such, from his added powers, if he has any, as trustee.

You will find this distinction clearly brought out in the case of

21 Wend. 430

The case of

48 Mich. 442, at first glance, seems to be an exception to the general rule as I have announced it, but upon closer scrutiny it does not appear to be an exception.

In this case there was a large estate in course of administration. Part of the property was in Michigan and an administrator was appointed in Michigan to dispose of it. A large part of the estate was in Vermont. A Mr. Moore, the appellant in this case, was the residuary legatee under the will in Vermont, so that he was entitled to everything in the state of Michigan that was not necessary for the payment of the debts. The Michigan administrator rendered an account that Mr. Moore did not like. The account was allowed by the Probate Court, and Mr. Moore appealed from the decision. The will in Vermont under which Mr. Moore claimed had never been proven here and it was objected that this instrument had no validity here, and Mr. Moore could not assert his claim here because that claim had never been proved or allowed in this state. The Court said no. The Court held that he had an interest under the will as probated in Vermont, and he had such an interest as would enable him to appeal in this state.

An executor is entitled in his own person to the property of the deceased. An executor can bring an action in his own name for a conversion of the property. His appointment as executor vests the title of the property in him. Here is an executor that has recovered a judgment as executor in this state. The judgment debtor is in the state of New York. The only way that he can enforce the judgment is to bring suit upon it. Is it necessary that an ancillary administration be issued in the State of New York. Not at all. The executor

owns that judgment by virtue of his appointment, and he may begin an action on it in his own name. The law of the situs vests the property in him. If he should go to New York and attempt to bring suit on that judgment as executor or administrator he would probably fail. But when he begins the action in his own name he can recover in that action precisely the same as if the judgment had been assigned to him.

16 Mass. 71
7 Calif. 403
59 Am. Rep. 550
21 Mo. 227
64 Am. Dec. 225-8

We come now to those cases holding that where there are no creditors within the jurisdiction there is no reason why a foreign executor or administrator may not collect or properly discharge a debt.

9 Wall. 740

In this case it appeared that a testator died in Alabama and letters of administration were issued. The defendant resided in Tenn. and owed the testator at the time of his death. He paid this debt to the Alabama administrator. Subsequently ancillary administration was issued in Tenn. And the administrator in Tenn. demanded payment of that debt which he had already paid to the Alabama administrator, payment being refused, an action was brought to recover that indebtedness. It was made to appear that the deceased had no creditors in Tenn., the only thing that he had was this asset which had been colected. Notwithstanding the Circuit Court of the United States held that the Tenn. administrator was entitled to a judgment for the amount of the debt paid to the Alabama administrator. The case being taken to the Supreme Court of the United States, the judgment of the lower court was reversed and the case sent back for a new trial.

The Supreme Court in ruling upon this case laid down the following propositions:

(1) That personal property for the purposes of disposition wherever situated must be regarded as having no other place than the domicile of the owner at the time of his death.

(2) The original administrator is therefore vested with the title to all personal property of the deceased for purposes of administration.

(3) Though he cannot sue to recover assets outside of the limits of the jurisdiction that appointed him, it is not because of defective title, but because the assets in a foreign jurisdiction are subject to the claims of home creditors.

The case wassent back for a new trial and the plaintiff recovered again, and the same case is reported in

108 U.S. 256

The supreme Court again reversed the judgment of the lower court and pointed out the reasons assigned in the first reversal. What became of the case afterwards I do not know. I come now to speak of the

STATUS OF INFANTS.

This is a most interesting subject, but the decisions are in such a condition that I am not able to lay down any general principles. I do not know what the law is and I do not knowof anybody that does. All that I can do is to tell you what has been said and what has been written upon the subject.

In a legal sense all persons are infants until they attain the age of majority. If the age of majority were the same in all countries there would be no trouble at all. But the age of majoirty is not the same. With us the age of majority is 21 years. The age of majority is 21 in the U.S., France and Italy, Bavaria and Russia; 22 in Hesse; 23 in Holland; 24 in Austria and Prussia; 25 in Hanover, Danmark, Spain, Portugal and Norway.

Suppose a person is domiciled in Spain and he is twenty two years of age. He comes to this country and makes a contract. He violates that contract and is sued upon it. Is it competent for him to say I am domiciled in Portugal. I am an infant there, therefore I am an infant here, therefore this contract may be avoided by me. This question has been discussed and debated for a great many years, and it has not been decided or settled.

The lawyers upon the Continent of Europe reason somewhat differently from us. They think that our system of Common Law is very barbarous. They think that their own system is Classical and logicaly symetrical and rounded out by a species of scholastic reasoning. They say that when the law imposes a status upon a person, it goes with him wherever he may go. He cannot get rid of it any more than he can get rid of his skin. These gentlemen call this doctrine the ubiquity of personal status.

The Common Law does not hold that doctrine. When a man comes to this country, and is at the age of majority in this country, and enters into what we call a contract, the law imposes certain legal obligations upon him, and the law says it will not permit the law of another country to say that it does not. Of course that destroys the symetry of this theory of personal status. It is not so beautifully rounded out as the doctrine of ubiquity of personal status, but it is good common sense. The person can make a contract even though he is an infant at his domicile.

IS A PERSON WHO HAS MADE A CONTRACT exempt because he is an infant at his place of domicile?

Mr. Westlake, who has summed up the law of England on the subject, says that he does not know and that it has not been determined.

Mr. Parsons says of the American doctrine, that a party's personal status when it comes to matters of contract is determined by the law of the place where the thing is done. A party contracts here, and he is of age here, he is liable here.

The matter came up in La. in the case of

17 Martin 596.

The court in that case said that a person's personal status is to be determined or governed by the law of the place according to which he soonest attains his majority.

Mr. Fillamore says it is a monstrous doctrine. Nevertheless it has been approved elsewhere. It was incorporated in the German and Prussian Codes. And it was sustained in England, whatever the law may now be, in the case of

L.R. 313

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Nov. 11th, 1903.

L E C T U R E XVII.

----oOo----

In the case of
16 Mo. 359, or 65 Mo. 349,
plaintiff was an infant under the age of twenty-one. The Probate Court for a county in Arkansas, acting under the authority of a statute of that state, ordered that the disability of the plaintiff's nonage be removed so far as to authorize him to sue and recover all moneys belonging to him in the state of Missouri in the hands of any person, and to execute releases therefor in the same manner as if he were of full age. Thus armed by the order of the this court he went to Missouri and sought to enforce his rights there. But the Supreme Court of Missouri said that the legislature of Ark. had no power to pass a law which shall over-ride or control the laws of Missouri That is a very narrow doctrine If a persons statuts is determined by his domicile then the state of Ark. can endow the probate court with power in the premises. But the Supreme Court of Missouri did not seem to take that view of the case. The Missouri court decided the case as though the question of domicile had never been heard of.

You will find this question discussed in
Parsons Work on Contracts, (5 ed.) voL 3
page 575.

This question of the status of infants so far as concerns their contractual power is still open to doubt.

Legitimacy is also a status recognized by private international law. There seems to be no doubt or dispute that a child born in lawful wedlock is legitimate everywhere. By the common law of Continental Europre illegitimate issue is made legitimate if the parents subsequently marry, and that, I believe, was the rule of the Civil Law. But, by the common law of England, of this country the subsequent marriage of the parents does not legitimize issue previously born. There are statutes in some of the states by virtue of which the subsequent marriage of the parents makes children previously born legitimate.

Mr. Westlake sums up the English view thus: An illegitimate child is not made legitimate by the subsequent marriage of the parents, unless the law of the father's domicile at the time of the marriage worked such legitimation.

Savigny takes the same view in his work at page 380.
7 Clark & Finn. 817

An illegitmate child of Scottish parents was born in England. The parents afterwards married in England. The putative father's domicile was in Scotaland. By the laws of Scotaldn the child was legitmate by virtue of the subsequent marriage of the parents. But although legitimation by subsequent marriage is recognized by private international law, it does not in England by statute confer capacity to inherit real property. The power to inherit is limited to

children born in lawful wedlock.

7 Clark & Finn. 949
Westlake 753.

There is some English authority, however, that the law of the father's domicile at the time of the child's birth and at the tiem of the subsequent marriage of the parents must concur, that is, the child is not legitimate unless the law of the father's domicile at the time of the child's birth and at the time of the subsequant marriage concur.

So laid down by

Westlake, sec. 51,

and in some cases cited by him in that connection.

The question in this country is not free from doubt.

The Supreme Court of Alabama held that the law of the father's domicile at the time of marriage controls.

45 Ala. 411

Justice Story expressed a similar view in his work on the conflict of laws.

23 Miss. 166.

An illegitimate child was born of parents domiciled in S. Carolina. The parents subsequently married in S. Carolina. By the laws of S. Carolina the subsequent marriage of the parents would not render the child legitimate. So that in S. Carolina this child was illegitmate. Afterwards these people took the child to Mississippi and there acquired a domicile. By the laws of Miss. the subsequent marriage of the parents makes the child legitimate. These people always recognized this child as theirown. But it was held by the Supreme Court of Miss. that the child having acquired its domicile and status by the laws of S. Carolina, it must be regarded as illegitimate every where. And it could never inherit in Miss. There the doctrine of personal status was carried to the extreme.

11 La. Ann. 232

In this case the parents of an illegitimate child were domiciled in Arkansas. The child was legitimized by a special act of the Arkansas legislature, and it was held that the child must be regarded as legitimate in La., and capable of inheriting there.

This was the converse of the above proposition.

. . . .

It is said that naturalization depends upon domestic policy which cannot be controlled by foreign law, and our naturalization laws extend only to such children born aborad whose father at the time of the child's birth was a citizen.

Wharton Conflict of Laws, sect. 245

There are no decisions upon the point.

There may be legitimation by (1) Statute, or,(2) Edict. According to the best opinon legitimation by edict will be internationally recognized if granted by authority which is valid at the putative father's domicile, but when the putative father and the children have not the same domicile

then it must be governed by the law of the domicile o the child, and that would be the domicile of the child's mother.

Some very interesting questions arise in connection with polygamous marriages. This country and no state in this country can recognize a polygamous marriage. Suppose a child is born in a Turkish Harem, whose father had forty wives, should come to this country and claim the right to inherit. That child was born in lawful wedlock. In Turkey the marriage between the father and the forty wives is valid and there the child is legitimate. We recognize the legitimacy of that child for the purpose of allowing it to inherit, but for no other purpose. It would be outrageous to say that this child would not be capable of inheriting its father's property.

A similar case arose in Michigan, although the child was not born in a Turkish harem. A child was born to an Indian chief who had as many wives, it not more than the Turk. The case arose in the upper peninsula of Michigan. The case was the case of,

76 Mich. 498

Cobogen was the son of an Indian chief who had many wives. He was not the son of the first wife, but a son of one of his subsequent wives. It was contended that he was illegitimate and therefore not capable of inheriting. But both the U.S. and the government of the state of Michigan recognize the tribal relations of the Indians; that they are a sort of a state within a state; and that they make laws unto themselves, and are not subject to the laws of the state generally. According to the laws of these Indians it was competent for a man to have more than one wife. Therefore the government of the state of Michigan recognized that this child was born in lawful wedlock, and was therefore capable of inheriting.

in the

19 Ind. 3,

a directly opposite conclusion was reached. I can only say for the Supreme Court of Indiana that it stands alone. I do not know of a single case in England or America or in any case laid down by the Continental text writers, which ventures to lay down a different doctrine from that of the Michigan case.

Lunacy is also a status recognized by Private International Law. But lunacy being a fluctuating state, a foreign decree adjudging a person to be a lunatic will not be given absolute effect. It is not a permanent status and an adjudication does not necessarily involve a continuation of that condition.

3 Russel Rep. 12

A person had been adjudged to be a lunatic in Jamacia. He was brought to England for his health in charge of a duly appointed committe. The chancellor treated the Jamcia commission as without authority and issued a new commission. But

ordinarily speaking the local court will appoint the domiciliary guardian.

so held in

125 Mass. 374.

The status of slavery was at one time a matter of considerable importance internationally. I had supposed that so far as the U.S. were concerned we were done with it. But whether we have or not seems to be a matter of some doubt in view of the negotiations between the Philippine Commission and the Sultun of Sulu. However, international law agrees that the status of slavery is not unbiquitous.

1 Wash. 499
1 Wire 413
18 Pick. 198

It seems that where a slave has acquired a domicile in a free state, he could not again become a slave by returning to the country in which he was formerly held in bondage according to valid international law.

Story, International Law, sec. 96.

But otherwise if he returns before acquiring a domicile in a free country.

suppose a slave from Morroco comes to the U.S. and acquires a domicile, and then returns to Morroco. I have little doubt but the laws of Morroco would restore him to his master. But suppose he should appeal to the U.S. claiming that while he was not a citizen of the U.S., he had acquired a domicile there, and by virtue of his domicile had acquired the rights of a free man. Would the U.S. interfere under such circumstances? It might or it might not. It would have a right to from a standpoint of international law. What would the U.S. do if the government of Morroco refused to give the slave up? Under the state of things it could do nothing but send out some gunboats, or possible an army, and clean out the establishment.

It is well to bear in mind the distinction in such cases between the municipal law and the rights acquired under the international law. Out courts have nothing to do with such questions. It belongs to the political department of the government.

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Dec. 7th, 1903.

L E C T U R E XVIII.

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Persons attainted or declared infamous or civilly ded.

There was a time in England when persons were attainted by acts of Parliament. It is still the practice of some governments to declare persons infamous. In Common-Law-Countries a person cannot be tried and convicted of a crime without being present at his trial. In civil law countries, if a man is charged with crime, his trial is fixed for a certain day appointed, and they try him just the same whether he appears or not. Suppose he is sentenced to be hung, and if they have not apprehended him, on the day appointed, they cannot hang him, but they nail his name on the gallows and declare him infamous. When he is declared infamous, he has no rights, and any person can take his life. That is a very nice sort of status to have. To walk about the streets with your life forfeited. That kind of status is not ubiquitous.

The penal laws and penal judgments have no extraterritorial force in common law countries. Hence it follows that a person attainted in a foreign country will not carry the burden with him if he comes to this country. Except possibly when such persons goes upon the witness stand, it may in the minds of some persons affect his credibility as a witness. Such questions may be put to him upon the witness stand: Q. Where do you live? A. I live in Detroit. Q. How long have you lived in Detroit. A. Two months. Q. Where did you live before that? A. I lived in Jackson. Q. What did you do in Jackson? A. I lived in the States Prison. Q. How did you happen to be there? A. I was sentenced there for perjury. Upon the same theory you could ask a person where he lived before he came to Detroit, and he might answer that he lived in Australia. Q. Why were you there. I was a political refugee. Q. Was you not declared infamous abroad? A. Yes sir. The jury have a right to know this in order that they may know what sort of a person is testifying. If he states that he is a political refugee, I guess it would not hurt him very much in the [illegible] opinon of the jury.

The Continenetal Jurists accept the doctrine of international infamy. If a man is declared infamous in [illegible] Austria he is regarded as infamous in Russia, France and elswhere. This doctrine is based upon the fact that Christendom was united under the Roman Imperial Crown, and when Christianity in its charity placed its mark upon a human being it remained where ever he went.

MARRIAGE.

The status of marriage is one of the most important heads of international law. The validity of a marriage solemnized in one country may be drawn in question in another country in a variety of ways. Here is a man married in England. He and his wife come to this country. He, or she may obtain a divorce. One of them marries again here, and goes back to England. Lo and behold there are proceedings against them for bigamy, for adultery, or possibly for divorce. You can see that the validity of that marriage here can be drawn in question abroad in a variety of ways. Or for instance a marriage is solemnized in Europe in a manner that would not be recognized here, and would not be legal here. The question is how far shall we recognize such a marriage. That is a very important question and a very delicate question, and it is too bad that the courts do not agree upon these questions. The confusion arises in that the status of marriage depends upon the domestic policy of a country, with which it will not allow the laws of another country to interfere. So we have this anomalous condition of things, John and Jane may be husband and wife here and may not be so recognized any where else. And the converse, take the Sultan of Sulu, I dare say he has many wives, suppose he should come to this country and visit President Rosvelt and bring all his wives with him. And he should set them up in an establishment in Washington right under the shadows of the White House. Or suppose the Sultan of Turkey should come here with all his harem, we could not recognize the validty of any such marriages. Why? Because or domestic policy forbids. It is alright in their own country. But in Christian states their policy is such that no such marriage can be recognized. So in the very nature of things, it is utterly impossible to have uniform laws upon this question. But there are some rules that have been recognized, and it is to these that I propose to call your attention.

You can see what a variety of questions may arise. For instance, the question of a party right to inherit, and possibly criminal responsibility.

It is said that marriage is an international institution of Christendom.

Possibly a great deal of confusion arises from the fact that when you and I speak of marriage we have in mind the Christian marriage,--a monogomous marriage for life. The Christian marriage is a product of Christianity, and was not known or practiced before the advent of Christianity. Before that time we were polygamous, and in countries to-day not under the sway of Christianity they are polygamous. So when we speak of marriage we have in mind one thing, and people who are not Christians have in mind an entirely different thing. Let us confine ourselves in discussing this question to a Christian marriage, and as its validity may arise in Christian states and as between Christian states. When I speak of a Christian state, I have reference to a state that either

recognizes Christianity, or whose people as a whole claim adherence to the Christian Faith.

Here a marriage is a contract, but it is the law that creates the relation. If it were a mere contract, the parties could dissolve the relation, or modify it. But in this case, if you make the contract, the law impresses the relation upon you.

23 Wall. 147

When the marriage relation exists, the parties may not mold it into new forms, or separate it from any of its incidents.

Dr. Wharton,

Sec. 136,

points out that from the standpoint of international law, marriage in its essential features, belongs to a sphere whose primary laws the state has no power to disturb.

Marriage has certain essential features as recognized by International Law, which no state can disturb. If a municipal law seeks to disturb it, the municipal law will receive no international recognition, or rather a marriage that is contracted in accordance with a municipal law that fails to recognize the essential features of a Christian marriage will not receive international recognition

The features of a Christian marriage are:

(1) The parties must be competent.

(2) The agreement must be exclusive, or otherwise monogamous.

(3) It must be for life.

The question is suggested whether the last qualification has not been destroyed by the statutes. Nominally every marriage is for life, but the divorce statistics are growing such that they should bring theblush of shame to the American people.

Dr. Wharton, therefore concludes, sec. 127, "when foreigners being incapable of marriage marry on our shores, according to our laws, but incapable by their personal law, that is by the law of their domicile, we hold that their marriage is not invalidated by such incapcity." In other words, when by the law of a state in the United states persons are capable of marrying, although incapable by the law of their domicile, if the marriage is solemnized in the state where it is valid, the marriage is valid.

When our citizens, incapable of marrying in this country, marry abroad, according to the laws of the foreign country, we recognize such a marriage as valid. That is, if it is a common-law-marriage we recognize it.

It is essential to distinguish between the legal capacity to marry, and the form of marriage.

Westlake Private International Law, sec. 22, page 56, says:

" "When by his personal law, that is the law of his domicile, a person cannot marry in any forum without a certain

consent, the want of such consent will invalidate the marriage by him, notwithstanding it is in compliance with the lex loci actus, that is in compliance with the law of the forum where the marriage is solemnized."

Westlake cites the case of,

11 Cl. & Fin. 85.

In that case the marriage was celebrated in Rome by an Anglician clergyman. This marriage on account of the standing of the parties required the consent of the King and Council, or the tacit consent of Parliament under the first section of the Royal Marriage Act. Because this gentleman did not have the consent of the King, altho valid according to the laws of Rome, this marriage was declared to be null.

This decision was approved by Lord Campbell in

9 H.L. Cas. 216.

The Irish Courts have decided differently.

1 Radcliffe _____

A prior existing marriage renders all subsequent marriages void. About this question there has been a great deal of historical and bitter sectarian and denominational controversy. A great deal has been said against the attitude of the Roman Catholic Church on this question.

Dr. Wharton, sec. 182, says that the Papal See has allowed dispensations for a second marriage, and he cites two cases, one of which was in Switerzland in 1804. But this is denied by the Catholic Church which says that it has never allowed a second marriage except upon the theory that the first marriage was null and canonically void. If the first marriage was null, then, in contemplation of law, there was no marriage, and the so-called second marriage would be the first marriage.

How far the attitude of Dr. Wharton and his followers is justified historically I do not know.

It is said that Martin Luther sanctioned a second marriage by one Phillip of Hesse while his first wife was still living. Phillip was a Saxon prince who desired to have an heir, but his wife was barren. He wanted to take unto himself a wife that would bear him a son. It is said that he consulted Luther, and Luther said that if this is your real motive, God may forgive you, but the people will never forgive you.

Notwithstanding what the academical discussion may be it is a fundamental principle of all christian states that a second marriage, the first remaining undissolved, is void, and will be so treated no matter where contracted.

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Dec. 7th, 1903.

L E C T U R E XIX.

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You all remember the case of Henry VIII who wanted a divorce from Catherine. He applied to Rome and the ground upon which he appealed to the Pope was that the marriage to Catherine was illegal. The papal see did not so decide. It is said that Henry went over to the Reformation because the Papal See was unwilling to recognize his second marriage. The Roman See found that the invalidity claimed by Henry VIII did not exist. If it had existed in the opinon of the Roman See that marriage would have been declared illegal and Henry could have married again within the ban of the Roman Church, and he could not have violated any previous marriage because, in contemplation of law, there would have been no previous marriage.

The existence of this prior marriage may be open to question,

1 As a matter of fact;
2 As a matter of law;
3 As to both.

As to a matter of fact, it may be exceedingly difficult to determine. A man may dissapear and not be heard of for years. some times he leaves his home to appear years afterwards. The wife is left alone. She has what appears to her to be conclusive evidence that he is dead, and she marries again. Afterwards the first husband appears upon the scene.

The canon law raises no presumption of death by the absence of the party. In some countries of Europe the Legislatures have stepped in and fixed an arbitrary period to provide for just such contingencies. The common law presumes that after seven years the missing party is dead. But this is a mere presumption. It is a rebutable inference. If the party appears the law does not presume that he is dead, in the face of his living.

I do not know whether there is a statute in this state, but there are statutes in some of the states, and there ought to be in all of thes states.

A very curious case happened in this state. It is interesting because it serves to illustrate the potency of the powers of spiritualism. There was in Detroit at that time a very wealth man by the name of Ward. He was a great spiritualist. He had business relations with a man by the name of Buehl. Buel lived on the Lake Shore and was due to meet Mr. Ward at noon of a certain day in Detroit. Mr. Ward's office was in a building that stood near the dock at which the steamer bringing Mr. Buehl down to Detroit would land. The steamer had landed and discharged its passengers and Mr. Buehl had not put in his appearance. Mr. Ward wired to Mr. Buehl's place of business and received an answer that Buehl had left on that steamer. He waited until afternoon and Mr. Buel did not put in his appearance, and then he had the books of the steamer examined and ascertained that Buehl had been on board and had been seen by the passengers on board the steamer, and was

seen to leave the boat. Where was Buehl? Several years went by. Letters of administration were issued and he was proved to be dead. The following is the evidence that was offered of his death. As Mr. Ward's relations with Mr. Buehl were very large and conflicting it was of interest to him to find out what became of Buehl. At that time there was living in New York a spiritualist by the name of Slade who had made a great fortune by communicating with the spirits of the other world. Mr. Ward went to Slade and communicated the circumstances. Through the aid of Mr. Slade the spirit of Buehl was brought in communication with Mr. Ward. The spirit communicated with Mr. Ward by means of a slate upon which it wrote the following: I arrived in Detroit by such and such a steamer; it became necessary for me to go immediately to my hotel; I went to the Cass Hotel and registered and was given room number 20; I stayed in my room until supper; after supper I lit a cigar and walked down fith street and off the dock and was drowned. Ward went back to Detroit and had the register of the Hotel Casslooked up and sure enough Buehl had occupied room 20, and had walked out in the evening and had never been seen again. Thus it was proved positively that Buehl was dead. Four or five years had elapsed and Buehl's debts had been paid, when at high noon one day, who should walk in to Mr. Ward's office, but Jacob Buehl. Buehl explained how he happened to be away so long. Suppose Mrs. Buehl had married, she would have been justified upon this showing. His disappearance from the hotel alone would have been sufficient without the corroboration of the spirit of Buehl. It is easy to see where Slade got his information. This goes to show that truth is stranger than fiction.

There are three theories of the law that determine matrimonial capacity.

(1) That it is governed by the law of the place where the marriage is solemnized.

The English and French authorities requires that this law be satisfied so far as the forms and ceremonies are required.

Westlake, sec. 13
Wharton, sec. 170

Dr. Wharton says: "the policy of the United States, in conformity with the common law of Christendom, deems the consent of competent parties sufficient without any ceremony."

He says that marriages abroad by consent will not be considered invalid, if it was impossible to use such forms, if they were opposed to the religous convictions of the parties, or were not imposed on foreigners.

A marriage which by our law is incestous will not be recognized here although valid where solemnized.

And conversely, a marriage in England with the deceased wife's sister is valid hre, altho invalid there.

The absence of the consent of a parent or guardian required by the law of the place where the marriage is solemnized is not always fatal to the validity of the marriage elswhere.

Mr. Westlake disputes both of these propsitions.
Maggard Consist. Rep. 430m433, 434

He says that it is indispensable to the validity of the marriage that the personal law of each party by satisfied so far as regards his cap city to contract it.

Where a state, from motive of policy, has prohibited a marriage between certain classes of persons domiciled within it, such persons cannot successfully evade such law by going into another state where there is no such prohibition and marrying. Very many states prohibit the marryin of a white person and a negroe. In England there is no such inhibition. Such a marriage would not even excite comment.

16 Mass. 157

The statute of Mass. prohibited the marriage of a white person with a negroe. Parties domiciled in Mass. went to Rhode Island, where such marriage was not prohibited, and were married. They then returned to Mass. The court held that the marriage was valid.

I think that this holding is contrary to the very great weight of authority.

It is interesting to observe that these decisions in other jurisdictions contrary to the Mass. decision arose in jurisdictions where there is a prejudice against the colored race.

30 Bratton. 858
5 Iredell 338
76 N.C. 251
39 Ga. 321
10 Ja. Inn. 441

There is a recent case in California, and it is the case of,

54 Pac. Rep. 143

which holds against the Mass. doctrine.

See also,

76 N.C. 242

This case was considered by the House of Lords in

9 H.L. 193

and condemned.

The attitude of our Political Department, as I have said before, has not always been in accord with the Judicial Department of our government. The attitude of the Political Department is stated by Mr. Wharton in

Wharton's Conflict of Laws, 261.

Some states have declared that marriages celebrated in their embassies shall be binding as though made in the state.

Congress has enacted that consuls may solemnize marriages of persons who would be capable of marrying if they were in the District of Columbia. That is born of the legal fiction that the hotel of the ambassador has extraterritoriality. So

if a party is married at the house of the embassy he is married in the U.S. But where in the U.S? Certainly not in any particular state or territory. That is the difficulty with this statute.

Wharton says that the fiction of extraterritoriality can hardly be pressed so far that a marriage made in the chapel of the ambassador may be sonsidered as being in every respect, as made upon the soil of the country. It would seem that it would not extend to strangers.

2 The second theory is that the validity of the marriage shall be governed by the law of the domicile.

This view is supported by Wharton, Fillamore and Salvigny.

The contractual capacity does not always depend upon the law of the domicile. The universal application of the rule would lead to absurd results.

Suppose a Jew is domiciled in a country where it is against the law for him to marry a Christian. If he should come to this country, we certainly would not say that such a marriage was void. Polygamous marriages contracted in China would be valid here under this rule.

The third theory is that capacity is a matter of distinctice state policy, and the judges are obliged to enforce the laws of the state.

Under this rule, the policy of the country is to encourage matrimony, and a marriage will be recognized when it possesses the essential features of a Christian marriage. But when the marriage is void at the place of domicile it seems it would be void everywhere.

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Dec. 7th, 1903.

L E C T U R E XX.

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In the natural order of things we now come to a consideration of the effect of foreign judgments.

F O R E I G N J U D G M E N T S

Judgments are either in :
(1) Personam; or in
(2) Rem.

A judgment in personam is one that is directed against the person, altho it may eventually in its execution be against the thing. Sometimes in proceeding to enforce such a judgment we proceed against the thing. It has been said by the Supreme Court of the U.S. that such a proceeding is in the nature of a proceeding in rem. But a judgment in rem strictly speaking is a judgment that originates in a proceeding against the thing. Suppose there is a case of smuggling. The bill may be filed against the owner of the vessel to recover the duty. That would be an action in personam. But it may proceed against the thing. And the title of the case would be The United States v. 500 bales of cotton, or whatever the thing might be. This is essentially a proceeding in rem. The owner, or any one having any interest in the thing can be heard in the case, but the proceeding is against the thing itself. The judgment, in case the libellant recovers, is that the thing itself shall pay, not that the owner shall pay.

Or suppose here is a vessel navigating the high seas. It collides with another vessel. The owner of the vessel claims that there was negligence. He may sue the owner of the vessel or he may proceed against the vessel itself. Suppose the vessel was "The City of Alpina", the title of the case would be "John Doe v. Steamer 'City Alpina'. The owner comes in and claims that vessel and says that the vessel is not chargeable with negligence.

It becomes important to distinguish between these two classes of judgments. For to entitle a judgment to extra-territorial recogni ion, it is necessary:

(1) That the court in personal action, have jurisdiction of the person of the party.
(2) In real actions, that the Court have jurisdiction of the thing.
(3) If in personam, it must be for a particular claim, or a fixed sum.
(4) The judgment must be final.

I take it you all understand what is meant by jurisdiction of the person. A Michigan court cannot summons a person outside of the state to answer any charge. In order to acquire jurisdiction of the person of the defendant service must be had upon him in the state of Michigan.

It seems to be well settled, with one exception to be mentioned, both in England and in this country, that a judgment possessing all of these requisities is conclusive on the merits. If a matter has been finally adjudicated any where by a judgment possessing these four requisites that judgment is conclusive every where. Where a matter has been thus determined it is the policy to put a quietus to further controversy.

That seem to be the rule every where until the case of

Guyot v. Hilton, 159 U.S.____

which case I have already called your attention to. In that case the Supreme Court of the U.S. were divided by a majority of 5 to 4 against the proposition as a universal rule. Guyot was a dealer in gloves in Paris. H. & Co. were retail dealers of gloves and had purchased gloves of Guyot to the amount of a quarter millions of dollars, for which they had not paid. A judgment was recovered against them in Paris, and the judgment as rendered possessed all these qualifications above mentioned. But before execution could issue upon the judgment Hilton removed from the jurisdiction of the French court. Thereupon Guyott brought an action in the Circuit Court of the U.S. sitting in New York upon that judgment, and they recovered upon that judgment. A Writ of Error was taken out of the Supreme Court of the U.S. Supreme Court to the Circuit Court to review that judgment and the Supreme Court of the U.S. by a majority of 5 to 4 reversed the judgment of the Circuit Court of the U.S. Why? Because they said the recognition of this judgment by the French court was a matter of comity pure and simple, and because the French courts did not recognize the judgments of the U.S. courts comity did not demand that the U.S. courts should recognize the judments of the French courts. For that reason the judgment of the French court did not receive recognition here. The action having been based upon the judgment of the French court, the action failed entirely.

It seems that the case of Guyott v. Hilton reversed the case of

2 Wash. C.C. Rep. 505; 1 Fed. Cases 538

This is an interesting case both from a judicial and historical standpoint. You are all familiar with Napoleon's Milan Decree. Napoleon was a gentleman who paid very little attention to international law or to any other law excepting the law of his own free will so far as he could back it up by his cannon and his soldiers. It is a rule of international law that in order to establish a bloackade it must be made effective. It is not competent for any government to say that a certain port is blocaded. That is a mere paper blockade. In order that there be a blockade there must be vessels enough to enforce it, and they must make it a blockade in fact. Suppose a foreign government should make a written decree that the Port

of New York was blockaded and every vessel seeking to enter that port should be deemed to have violated the bloaclade. If the blockade is well established the violation of the blockade by any vessel renders that vessel liable to seizure. The blockade is not only the paper declaring the blockade, but it is the rendering of it effective. That is, the putting about it such an armed force as will completely and effectually blockade the port. Napoleon was incensed at some action of the English and while in Milan he made a decree declaring all the English ports to be under blockade. And the French Prize courts proceeded to enforce that decree by condemning all vessels found guilty of violating this Milan decree. The American steamer Fortitude sailed on the 20th of August, 1809, with a cargo made up partly from the United states and partly from Martinique, for New London. She was captured by a French privateer, condemned as lawful prize, and cargo sold under sentence of the court. Part of the cargo was sent to Philadelphia where the owners lived, and these parties undertook to seize those goods. The question arose between the former owners of the goods and the purchasers under the judgment of condemnation in virtue of the Milan Decree. The whole controversy turned upon the validity of the judgment of the French court.

The validity of the decree was attached upon the ground
(1) The action was based upon the Milan Decree which was in violation of International Law.
(2) The action of a foreign prize court is not recognized by the French law.

(In this connection I want to call your attention to the distinction between a void judgment and an erroneous judgment. If a judgment is void it has no effect whatsoever. It is void if the court had no jurisdiction to pass upon that kind of a question, or had no jurisdiction of the person or thing involved. But if the court had jurisdiction, the fact that the court made a mistake in exercising that jurisdiction does not affect the validity of that judgment. The judgment may be valid though erroneous. It may be correct and free from error but void because the court had no jurisdiction to pronounce it. A case illustrating this point arose in Michigan. The Circuit Court held that a a certain statute of Limitations was applicable to a case and gave the land involved to the defendant in the case. The case was not taken up; the party submitted to that judgment. Three years afterwards a case involving precisely the same state of facts and the precise statute was submitted to the Supreme Court of the state and they held that the statute did not give the land to the defendant. It thus appeared that in this first Michigan case the court had been in error and this error had deprived the plaintiffw of his property. Thereupon the plaintiff applied to the court for anew trial. A new trial was granted. The order granting a new trial was set aside by the Supreme Court, which said that the court had made a mistake in ruling as it

d d, and had no power to grant a new trial, and the party must abide by that judgment)

The decisions in this case says: "The Prize Courts are courts of law, and to their proceedings all the world are parties. The proceeding is against the vessel, and any person has a right to be heard.

But under the effect of the sentence upon the thing condemned, no dount is open that it is conclusive, working a change in the property so long as the sentence remains in force, and not changed by the higher court. If the principle be thus general and exclusive, it is not important whether the foreign sentence be erroneous or not, or whether the error consist of a mistake of the court, as a matter of fact, or a misconception of the acknowledged law of nations. The rule is not examinable by any other court having concurrent jurisdiction over the subject. Therefore, if by a decision obviously unjust and unwarranted by the law of nations, an individual is injured, redress is due to him by his own government, the only power competent to redress here. But the tribunal does not lose its character as a tribunal of the law, because its decision is repugnant to the law of nations."

Thus the matter is res adjudicata no matter whether the prize court is right or wrong. You can see that if it were competent for a court to retry questions of law or fact there would be no efficary of the judgment of a foreign court at all.

Upon the second point the court said " Whether the adoption of the rule in any case, of reciprocity, need not now be decided. It certainly does not prevail, even in England, in the Common Law Courts, and it has never to our knowledge been admitted to the prize courts of our country. Most certaily the court which means to act correctly will never depart from the rule of right, and reverse fixed principles of law, because a foreign tribunal has done so."

"The rule of law which governs the court in deciding this case, is in our opinon a wise one, and has appeared otherwise only because the order of nations has been violated by the belligerents. We confess that we sicken with dis ust in giving the appellant the be efit of the general principles of law which compels us to submit to such a daring outrage, but we must obey the law and leave it to our government the task of protecting its citizens.

This question came up in
7 Cranch 423.
Chief Justice Marshal, speaking for the whole Court, said that it makes no difference whether the error in the judgment of the court is apparent or not, if the judgment binds the property upon which it acts, it will not bind it less because the error is apparent.

The case of Guyott v. Wilton marks a departure from the judicial policy as manifested in the U.S. from the beginning. I think it is revolutionary.

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Dec. 14, 1903.

L E C T U R E XXI.

You should distinguish in this connection between a domestic and a foreign judgment. The averments in the record of a domestic judgment are conclusive, but the averments in a foreign judgment are not conclusive, they are only prima facie true. They may be contradicted. If the defendant says that he was not served as it appears by the record of the foreign judgment he may go upon the stand and so testify. Whereas if the suit is brought upon a domestic judgment it is not competent for him to contradict any of the averments made in the record of that judgment.

There are some judgments that may not be enforced at all in a foreign jurisdiction. A judgment that imposes a penalty, that is a, a statutory penalty, may not be enforced in a foreign jurisdiction. If it is imprisonment it cannot be enforced, neither can it if it be to pay a certain sum of money. There is no question as to the general principle, but the difficulty is in determining whether the judgment enforces a penalty or not.

This was the question in the Supreme Court of the United states in the case of,

146 U.S. 657.

That was an action upon a judgment under a statute making the directors of a corporation liable for the debts of the corporation in case of failure to file proper reports. It was held by the court in that case that the judgment was in the nature of a penalty. The Supreme Court of the U.S. held that such a judgment was a penalty, but allowed the plaintiff to recover upon the ground that the rule inhibiting action on a foreign judgment for a penalty was limited to penalties for the benefit of a state, and not for the benefit of an individual. It is an obligation to pay money imposed through a failure to discharge a duty and is therefore strictly speaking a penalty, but the Supreme Court of the United States said that while this statute is a penal statute it is not so internationally, and whether or not it is so depends upon the question whether its purpose is to punish the offense, or to afford a remedy to the person injured by the wrongful act.

It is said that a foreign judgment will not be enforced when it is based upon a statute purely local in its scope and character. There is only one case that I know of that illustrates this rule.

10 Blatch. 436

It is rather an amusing case. The French Code provides that the father in law and the mother in law must make provision for the son in law, if he becomes needy, so long as a child of the marriage is living. There was a gentleman in

France who had a father and mother in law who had refused to make such provision. He sued them in France and got a judgment under the provision of this French Code. Then the father and monther in law went to the U.S. and he followed them and brought an action in the Circuit Court of N.Y. upon that French judgment. The court held that a judgment under a statute based upon the domestic policy of France would not be enforced in this country.

Formerly the court refused to enforce any judgment rendered abroad founded upon a statute and not upon the common law.

This distinction was wiped out in the case of

103 U. S . 11.
41 Ill. App. 116

This illustrates the artificiality and sometimes absurdity of the common law reasoning. When an action was based upon a a statute it could not be enforced elswhere because a statute did not have extraterritorial force. Mr. Justice Miller pointed out that if the statute had no extraterritorial force then the common law certainly did not have any extraterritorial force. The common law certainly has no greater force than the statute. And if a right founded upon one can be enforced in any jurisdiction then certainly a right founded upon the other can be enforced in any jurisdiction.

A foreign judgment is to be distinguished from a domestic judgment in this that a party in whose favor it is rendered may waive the judgment and sue upon the original cause of action.

The judgment of a sister state in the American Union is in a sense a foreign judgment but in this country it stands upon a ground peculiarly its own. A judgment of a sister states has thrown around it certain safeguards in virtue of a provision of the Constitution. By virtue of the Constitution that judgment operates as a merger in every state in the Union. One of the differences between a judgment of a sister state and an ordinary foreign judgment is that the judgment of a sister state may be plead in bar of an action upon the original indebtedness or cause of action. If I begin an action in France and recover a judgment there I have the option either to bring suit upon the original cause of action in this country or to sue upon the judgment. If he brings an action in the state of N.Y. upon the same cause of action and recovers a judgment there, he does not have the option to sue upon the judgment or the original cause of action any where within the U.S. because the original cause of action ismerged in the judgment.

The provision of the Constitution which provides that full faith and credit shall be given to the acts of sister states has been the subject of a great deal of discussion and judicial determination. The question presented itself at a very early day whether or not you could attack collaterally the jurisdiction of the court of a sister state in which the judgment was rendered.

You can always impeach the jurisdiction of an ordinary foreign judgment, but for this purpose the judgment of a sister state is not treated as a domestic judgment. The Supreme Court of the United States after much controversy determined that the jurisdictional facts which control the judgment of a sister state may always be inquired into. A foreign judgment may always be impeached for want of jurisdiction over the parties or the subject matter. A domestic judgment may not always be impeached, for if the record shows that the Court had jurisdiction, properly obtained, over the persons and the subject matter, it cannot be disputed. You cannot contradict the record of a domestic Court. But when you take this same judgment to New York, the record is impeachable there so far as it recites jurisdictional facts.

So far as it determines the matter in controversy, it is not impeachable, but it is in regard to jurisdictional facts.

18 Wall. 460
9 Fed. Rep. 229
9 Fed. Rep. 242

In this case it was finally determined that in an action upon a judgment of a sister state the jurisdiction of the court who rendered it may be inquired into. You may ask what is left of the Constitutional provision that full faith and credit must be given to the acts of the sister states? What is left of it is simply this: that when you have established the fact that the court had jurisdiction then you must give full faith and credit to the judgment. It is conclusive.

There was a time when the courts were not clear in their determination just how far a judgment was impeachable for fraud. Suppose a man is sued upon a debt. He says that he has paid it on a certain day, that he took a receipt, but has lost it. The jury finds that he has not paid the debt. Judgment is awarded against him. That judgment is sued over in a foreign jurisdiction. The defendant seeks to impeach the judgment on the ground of fraud, saying that the plaintiff swore falsely when he swore that the debthad not been paid, and that he knew that he swore falsely. The court says, if we permit this judgment to be opened upon this ground we must try the identical question tried in the forum. If we try it over what becomes of the question of res adjudicata? Such action would make the judgment a mere prima facie. That question troubled the courts for a long time, and was finally solved in this way. The mere fact that the judgmentwas wrongly rendered will not set it aside. It is not impeachable for error in fact, but theparty must satisfy the court that the plaintiff who recovered in the case knowingly produced false testimony, and was thereby guilty of fraud.

Dicey, Digest of Priv. Int. Law, 404.
25 Q.B. 310-316-317
10 Q.B. 295
5 H. & N. 728
8 Sim. 279

----oOo---- Dec. 1903.

L E C T U R E XXII.

At the outset I endeavored to call your attention to the distinction between a judgment in personam and judgments in rem. If the court had jurisdiction of the thing then a judgment that eventuates in a proceeding against that thing is conclusive and binding upon the whole world. The thing proceeded against must be within the jurisdiction of the court, and being within the jurisdiction of the court, the court must take it into its custody. Here is some whisky that has been illicitly distilled. The government wants to proceed against it. The governmenthas a double remedy. It can proceed against the chap that distilled the whiskey, and secondly it can proceed against the whisky that he has produced. If the whisky is within the jurisdiction of the U.S. the government may proceed against the whisky that he has produced, and it proceeds against it by seizing and taking possession of it. Suppose we are in Kentucky and in the moonshine district. It wont do for the government simply to proceed to file its libel against some whisky that may be within its jurisdiction. The court must seize the thing. And a judgment against the thing when the government has not seized it is an absolute nullity. So that the thing must be within the jurisdiction of the court and the court must exercise that jurisdiction by seizing the thing.

In the case of

10 Wall. 308

the Supreme Court of the U.S. took very great pains to distinguish between a judgment in personam and a judgment in rem. That is a case that you all ought to read. It is the leading case upon the subject. I do not think you can fully understand the present view of the courts upon this subject unless you understand this case. A has a claim against B. B resides in New York, and has property in Michigan. A brings suit by attachment without service upon B. The writ of attachment acts as a summons. It directs the sheriff to attach the goods and summon the defendant. The sheriff cannot find B and therefore cannot summon him. The Court has no jurisdiction over the person of B. But the case may go to judgment and the sheriff may levy upon all the goods attached in the jurisdiction. Now this is primarily a proceeding in personam. It is commenced against the person and not against the thing. The statute provides how the case shall be prosecuted. The judgment is satisfied out of the property originally attached. The court gets jurisdiction of the property. It has possession of the res, and applies the property to satisfy the judgment. Suppose the judgment is for $1000 and the property is worth $500. The judgment as to the difference is an absolute nullity. It is purely a judgment in personam, and the court never had jurisdiction of the person of the defendant. But what was realized out of the

thing attached was valid, because it was in the nature of a proceeding in rem, and the Court had jurisdiction of the thing.

A very important case that illustrates the distinction is

5 Otto, 714
95 U.S.

This is a leading case, and you ought to be familiar with the leading cases.

That was an action of eject. The statute of the state of Oregon provided for substitution, publication by publication in personal actions where the defendant is a non resident and has property therein. This service was made by publication and an attachment was made of the property. A judgment was rendered in that action of ejectment in Oregon and the plaintiff who claimed under that judgment brought an action of ejectment in the Federal Courts, but the Supreme Court of the U.S. held that the judgment rendered on the substituted service was an absolute nullity. Why? Because the court had not obtained jurisdiction of the thing. Why had it not obtained jurisdiction of the thing? Because the thing being within the jurisdiction it had not exercised its jurisdiction by taking possession.

A divorce decree is a species of judgment in rem. Why? While the judgment affects the persons to the marriage, it also affects their status. John and Jane are married. They sustained to each other a certain relation, that of husband and wife. That relation or status is in contemplation of law a thing. Every proceeding and every decree for divorce is in some of its aspects in rem. If it is not a judgment in rem, then a divorce granted in a proceeding where the defendant was not personally served is an absolute nullity.

This feature of the case was fully brought out in the case of

104 Ill. 35

That case involved the validity of a decree pronounced by a court annuling a marriage of persons domiciled in Ill. This decree was granted for a cause not recognized by the laws of Ill. But this decree pronounced in a foreign court affecting the status of persons domiciled within its jurisdiction was upheld in Ill. for the reason that it was in effect a judgment in rem. It was a judgment in rem because it affected the status of the parties.

This is a leading case and has been followed everywhere there has been occasion to adjudicate upon the matter and it is undoubtedly sound. But the only ground upon which it can be vindicated is that the matrimonial relation is in its essence a legal status and that a judgment affecting its relation is in its essence a judgment in rem.

The same result was reached in the case of

11 Ala. 196

There has been some disposition to question the reasoning of the latter case in

129 Mass. 196

143 Mass. 290

There seems to be no question that it is competent for a state to divorce persons domiciled within its jurisdiction. The question has been how can it be accomplished. The cases have not been in entire harmony as to when and under what circumstances persons are within the jurisdiction of the court so that a judgment can be pronounced that will be legal in an international sense.

The question in all the cases is, did the court have jurisdiction of the status and of the parties in an international sense?

It seems that the power to grant a divorce by legislative enactment resides in the legislatures of the state of the union with the exception so far as the power has been directly taken from them by the Constitutions of the respective states. We have a constitutional provision in our state which provides that the legislature shall not grant a decree for a divorce. Was it necessary to put that provision in our State Constitution? Oviously, yes, if it was desired to deprive the legislature of a power that before resided in legislative bodies.

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Dec. 1903.

LECTURE XXIII.

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I have chosen to consider the subject of INTERNATIONAL DIVORCE under the head of JUDGMENTS. It may be a misnomer to call this branch of the law international law, because there does not seem to be any rule of uniformity upon this subject. Some jurisdictions will recognize a divorce that is not recognized in other jurisdictions and the most that can be said of it is that the local law of the jurisdiction judges for itself of the validity of a divorce granted in another jurisdiction. There does not seem to be any uniform rule that I can discover. Therefore, I have chosen to treat of jurisdictions with which we in the United States are more apt to come in contact with separately.

THE SCOTCH LAW REGARDS MARRIAGE simply in the light of status. The Scotch take the loosest view of marriage and divorce of any people. Divorce legislation in the western states is conservative compared to it. They say that marriage is simply a status; therefore a divorce may be had irrespective of domicile, allegiance, or place where the marriage was made. Persons living in Scotland for no other purpose than to obtain a divorce may obtain a divorce. The most astonishing thing is that, although a part of the same nation and under the same Parliament, the English courts do not recognize the validity of the Scotch decrees of divorce. Foreign divorces, granted under similar circumstances elsewhere, are recognized in Scotland.

ENGLISH VIEW OF FOREIGN DIVORCE.--Prior to 1858, there was no such thing as judicial divorce in England. In 1858 divorce courts were established. Before that time only Parliament could give a divorce and it was a long and very costly operation. The proceeding in the British Parliament was quasi judicial. A committee investigated the question and if their finding was favorable, they recommended a bill. You will notice it was not even in form a judgment. When I speak of divorce in England, I do not refer to Parliamentary divorces, nor to the ones granted by the ecclesiastical courts, but to the later divorces made by the courts established in 1858. Prior to that time, it was the policy of England to hold marriage indissoluble. It was at one time held that marriages solemnized in England could not be dissolved any where else. If the parties were married in England and afterwards took up their domicile in the United States and were divorced in other jurisdictions, the English courts would not recognize the validity of such divorces.

2 R. & M. 614.
L. R. 1 Prob. & Divorce, 487.

It seems also that the English courts will not recognize a divorce granted in a foreign jurisdiction which was not the defendant's domicile. In other words, the defendants must be domiciled within the jurisdiction. That is not the present American rule.

2 Probate & Div. 161.

There was an English marriage, the husband being at the time of the marriage domiciled in England. The English law does not seem to trouble itself very much about the domicile of the wife. There was cohabitation in England. They went to America and returned to England. Then the husband deserted the wife and went to America. Then the wife also went to America, but made no effort to find the husband. She went to Massachusetts and then to Iowa and stayed there long enough to acquire a domicile there. Then she began there proceedings for a divorce, the husband having no actual notice of the proceedings. The divorce was granted on the ground of adultery and desertion.

The English court held that the court of Iowa had not international jurisdiction and that the divorce granted in Iowa could not be recognized in England. Undoubtedly it would have been good in the United States, for this woman was domiciled in Iowa at the time she instituted proceedings for a divorce.

Westlake § 46 says, 'A divorce will not be recognized in England, unless both the parties were domiciled in the jurisdiction that granted it.' He also says that 'It cannot be dissolved by a foreign decree for any cause for which it would not be dissoluble in England.' Of course, the reasoning at the basis of any such rule accentuates very strongly the contractual basis of the marriage relation. That is not a sound view to take.

Mr. Dicey, a more recent writer, page 389 says that 'No case absolutely decides that an English marriage can be dissolved by a foreign divorce, but the preponderance of authority and principle is strongly in favor of the validity of such a divorce when the parties are domiciled in the country where it is granted.' You will observe that even according to Mr. Dicey's rule, both parties would have to be domiciled in the jurisdiction that granted it.

I am unable upon the state of the authorities to speak with any definiteness as to what the English rule is, except this: that the English authorities seem to hold that no divorce has any validity unless both parties were domiciled within the jurisdiction at the time the divorce was granted.

Let us consider briefly FOREIGN DIVORCES IN THE UNITED STATES. You will recall that civil status is determined by domicile, especially with respect to the status of marriage and there seems to be a concurrence of opinion--Scotland alone excepted-- that a residence by itself (I speak of residence in contradistinction of domicile) of the petitioner is not sufficient to confer jurisdiction to pronounce a divorce of extraterritorial validity. In discussing this question in the United States as between divorces granted by the state courts, we again come in contact with the provision of the Federal Constitution, to which I called your attention at the last lecture.

Federal Constitution, Art. 4, § 1 provides that "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every

other state and Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved and the effect thereof."

It has been held that this language was broad enough to cover divorce cases. Hence it may be stated as a general proposition that a divorce valid in the state where it is granted is valid in every other state. This may be stated as a general proposition, not as a universal proposition.

18 Wall. 457

The question of jurisdiction may always be inquired into.

11 Howard, 165,

The question of jurisdiction is open and the constitutional and congressional legislation thereunder do not affect the question seriously. When one of the parties is domiciled in the state where the decree is granted, then the decree has extraterritorial force, otherwise not.

It is held that where neither party was domiciled in the state where the decree was rendered that the decree has no extra-territorial force.

It has since been held by the Supreme Court of the United States, and that seems to be entirely conclusive of the controversy, that the domicile of one of the parties is entirely sufficient. Before the Supreme Court passed upon this question, there was a conflict of authority. You will find it discussed in an article in the

Amer. Law. Register (N.S.), Vol. 16, p. 74.

The New York courts hold that where only one of the parties was domiciled and no service was had upon the other, that then if a divorce was granted, it had no international effect.

165 N. Y. 62.
115 N. Carolina, 587.
56 Wis. 195.

In our own country, therefore, there was a conflict of jurisdiction until the matter was settled finally by the Supreme Court of the United States. And inasmuch as a question of this kind can be taken to the Supreme Court of the United States, it makes no difference what the states have held, because the rulings of the Supreme Court are final.

181 U. S. 155.

In that case, the parties were domiciled in Connecticut and the wife deserted and went to her mother's in New York. Whereupon the husband petitioned for a divorce in Connecticut. The order for an appearance was entered and a copy was mailed to her by the attorney appointed for her by the court. Instructions were printed on the envelope for the letter to be returned if not delivered. Subsequently the woman began divorce proceedings in the State of New York. These proceedings were defended by the husband on the ground that she was not his wife, because the former marriage had been set aside by the decree of divorce in Connecticut. So, you see, that case presented squarely the validity of the decree pronounced by the Connecticut court. It was held that although no service of process was had upon the wife in Connecticut, nevertheless the decree there obtained was good.

The converse of this proposition came up in,
Bell v. Bell, 181 U. S. 175.
A previous case was
Greely v. Clinton, 110 U. S. 710
in which the Supreme Court held that the courts of the state of the domicile of the parties have jurisdiction to decree a divorce in accordance with its laws without regard to the place of the marriage and as to that of the commission of the offense for which the decree was granted, and the divorce if granted is valid everywhere.

4. L. I. 87.

So far as I now know, there is no jurisdiction in which it is held that a woman may not, for the purpose of divorce, acquire a domicile separate and independent from that of her husband.

There remains one more thing in this connection to which it is important to call attention. THERE ARE STATUTES IN SOME STATES that provide that the guilty party to a divorce shall not marry again. After the decree of absolute divorce is pronounced, the man is unmarried and the woman is unmarried. The effect of the divorce is to obliterate all that had passed between them. The man and the woman are single, legally speaking, as much as they ever were before marriage. Why should he not marry again? It is an anomalous condition of things. THE LAW SAYS that the provision that he shall not marry again is a punishment and can be enforced only in the jurisdiction in which the divorce was pronounced. That is rather technical reasoning, but it is a technical subject.

In New York a man got a divorce from his wife on the ground of adultery. The divorce having been granted, in accordance with the law of New York, the decree said that she should not marry again. The very same day that the decree was pronounced, she was married in New Jersey and then came back to New York and lived there with her second husband.

Could she be proceeded against? No, she could not, because the act of marriage was done not in New York, but in New Jersey, and she could not be punished in New York for what she did in New Jersey.

There are courts that take a different view. They say that this is a judgment in rem. It marks him out and that he is ineligible to marry. If that is the correct view to take of it, of course, he cannot marry anywhere else. If that is a judgment affecting his status, it accompanies him wherever he goes. It is a very easy thing to say that it affects his status, but how can you prove either proposition? It depends very largely upon what the different judges may say about it.

38 Md. 358.
5 Irid. 555.
6 Jones, 570.

You will find a very learned discussion in,
35 L. R. A. 224.

PROPERTY IN THINGS.--Things that may be the subject of property are either movable or immovable. The latter, so far as they are subject to the law of their situs, embrace all interests in land, whether for a term of years, life, or otherwise; servitudes, charges, liens, and all other dismemberments of property in land. In other words, movables embrace lands, interests in lands, and corporeal and incorporeal hereditaments.

Story, § 447

says, "All other things which, though movable in their nature, are by the local law deemed immovable."

In common law countries, a very broad distinction is made between movable and immovable things. Jurists of all schools agree that immovables are governed by the law of their situs in (1) the mode of their acquisition; (2) the mode of their transfer; (3) of their tenure.

When you come to consider the law applying to immovables, which is the law of their situs, there is no difficulty in ascertaining what their situs is, and therefore no difficulty as to the law controlling them. But as to personal property, its situs may be in one place or in another, and the law resorts to the fiction of treating the personal property as being either where its owner is, or where he is domiciled. If it were the law that personal property should be disposed of by the law of its actual situs, many difficulties would be avoided. Not all, however, for it is sometimes difficult to determine the situs of choses in action.

Real estate is governed by the law of its situs. It is a great question whether the sovereignty will permit the sale of real estate within the jurisdiction. At the common law, an alien could not hold lands. That rule of the common law was based upon the supposed policy of the British Government. The rule was enforced in this state, as a part of the common law, where inheritance was claimed through an alien.

It is peculiar how public policy in this matter shifts. At one time it was the policy not to allow aliens to hold lands. Then it was the policy of our government to encourage emigration and these restrictions were repealed, and now it is again asked whether we should forbid aliens to hold lands.

Whatever the policy of the state may be, the property is governed by the laws of the state where it is situated. This is the general rule. I notice one case where the rule seems to have been departed from.

42 Mo. 474.

In this case there was a general assignment executed in New York. It was in conformity with the law of the state of New York and covered lands in Missouri. This assignment was invalid by the laws of Missouri. A New York creditor went to Missouri and levied upon the land, claiming that the assignment was not good. The Supreme Court of Missouri said that the assignment was not in conformity with the law of Missouri, and ordinarily would not operate to transfer title. But inasmuch as the question is raised by a citizen of New York, domiciled there, and this assignment is valid

there, we will not allow him to raise the question here. Therefore, if the plaintiff had been domiciled in Missouri, the assignment would not have operated to convey title.

That sort of decision casts doubt upon any and all application of rules of law. This doctrine of the Missouri court has been repudiated by other courts.

In a case just like it, the court came to a directly opposite conclusion.

70 Iowa, 203.

Such seems to have been the result wherever the question has arisen.

1 Gray, 243. 7 Gray, 406.
13 Gray, 11.

With respect to mortgages, I do not know that it is necessary to make a detailed statement of the situation. So far as the lien is concerned, it can be created only in conformity with the law of the place where the property is situated; and so far as the debt is concerned, it is governed by the law of the place of the contract.

The distribution of immovables is governed by the law of their situs. The law of inheritance is the law of the place where the land or immovable thing is situated. This is the universal rule in common law countries, and is generally recognized elsewhere. Story, § 483.
Wharton, § 600.

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December 19, 1903.

L E C T U R E XXIV.

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At the close of the last lecture I was considering the subject of "property in things". I had said that things which may be the subject of property are either movable or immovable. I have almost covered the subject of immovables there yet remaining the subject of mortgages, which we will now discuss. A mortgage in one respect is a personal estate, but so far as it concerns realty it may be considered as an immovable. The creation of the mortgage lien is governed by the law of the place where the land is situate, whereas the creation of the debt is not necessarily governed by the law of the place where the land is situate. It is usually governed by the law of the place of the contract. You must consider mortgages in a double aspect)1) The Mortgage Debt;(2) The Security itself. So far as the creation of the debt is concerned it is not necessarily dependent upon the law of the place where the mortgages premises are situate. It may be. If it is, it is an accident; it is not a consequence of the situation. The mere situation of the security has nothing to do with the validity of the contract, whereas the creation of the security does depend upon the law of the place where the property is situate.

In questions of this kind you have to do with the question of construction and interpretation. It becomes important then to distinguish between 'construction' and 'interpretation'.

The interpretation looks to the ascertaining of the meaning of the words employed; whereas the construction looks to the ascertaining of the legal effect of the words thus employed.

This is a distinction that is very frequently over-looked.

This question arises in connection with wills. Justice story, page 479, held that the law of situs governed the construction of a will of immovables.

Wharton in his work, sec. 597, holds that such a will is to be construed as to the law of the owner's domicile.

10 H of L Cases 1.

In this case a British subject died in Russia and his will was made there. He owned real property in Russia and was a creditor of the British Crown, that is to say, that he owned both personal and real property. He made a will in the Russian language, and by which he disposed of his 'movable and immovable' property. 'Movable' and 'immovable' were phrases that at that time had no signification in the English Common Law. The question was how this language used in Russia should be interpreted. What did the Russian lawyer who drew up the will have in mind when he used these terms? The only way to find that out is to find how that language is used in Russia. It was ascertained that those phrases meant the same thing as

'real' and 'personal' property in England. Therefore it was held that this will covered his real and personal property in England. That was the interpretation. The construction of it involved the question what does real and personal property include according to the English law.

MOVABLES.

All things that do not fall within the dominon of immovables are classed as movables, and in contemplation of law they are supposed to be located at the owner's domicile. The title thereto can only be transferred or encumbered in accordance with the law of the owner's domicile, unless the law of their actual situs forbids the law of the owner's domicile to operate upon them. But ships at sea not within the territorial limits of any state, are subject to the jurisdiction to which they belong, and the title thereto may be acquired in accordance with its laws.

Patent rights, copyrights and trade marks are subject to laws peculiar to themselves.

The evolution of real property law was accomplished by resort to fictions.

Bouvier treats these fictions as though they were something of the historic past. This is not so. The jurisdiction of the federal courts over corporations in cases not involving a federal question is based upon a legal fiction. By the Constitution the federal courts had jurisdiction in controversies involving the interpretation of a federal statute, of the Federal Constitution, or a treaty. When a case involves such a question it is said to involve a federal question. If a citizen of one state has a claim against another person who is a citizen of another state, New York for instance, he may go to New York and bring his action against him in the Federal Court in the state of New York because there is a diversity of citizenship. Because of this diversity of citizenship the federal court assumes jurisdiction of this case. This result was worked out by the passage of the Judiciary Act. When this act was passed there was only one corporation in the state of Mass. And I think I can safely say no more than half a score of corporations in the whole U.S. It was held that when a question arose between a corporation in one state and a citizen of another that there was no federal question because a corporation was not a citizen therefore it did not involve a controversy between citizens of different states. For some time that seemed to have ended the matter, but with the growth of corporations and the assumption and accumulation of great capital a defect seemed to have been discovered in this legislation and in the constitution. And it seemed to be pratically a denial of justice to say that a foreign corporation could not sue or be sued in the federal courts. The Supreme Court of the U.S. subsequently in a suit said that if a suit is begun

against a corporation it is in effect a suit against a person. So that whatever may be technically the truth, as a matter of fact and in equity, the controversy between a corporation and a citizen is in its essence a controversy between the citizen and the persons who compose the corporation. Then after this decision, we were met with this difficulty: the shareholders may be citizens of the same state as the plaintiff or defendant. The federal court said that we will assume that the parties who are the shareholders of the corporation are citizens of the state in which that corporation is organized. There arose a case in which there was no diversity of citizenship between the shareholders of the corporation and the plaintiff. On which account a plead of abatement was interposed. The court said we do not know what the fact is, but we will assume that the corporation is a citizen of the state where it is organized, and we will not allow that fact to be controverted. That was a legal fiction. In a very bitter address delivered by one of the presidents of the American Bar Association the Supreme Court of the U.S. was accused of judicial usurpation in resorting to this fiction.

The Supreme Court of the U.S. finally came to the conclusion that a corporation was a citizen of the state in which it was orgabized. The evolution of this doctrine leads right through this fiction. It was no greater stretch of imagination for the court to indulge in than to assume that I domiciled in New York, and dying in New York, that this chair in Ann Arbor is property in the State of New York to be administered there.

A legal fiction is defined to be an assumption of a thing as true or false, which is not true, or as probably false as true.

Mayne, Ancient Law, 24 3t seq.

He says that a fiction is the legal assumption of a thing as true which is either not true, or as probably false as true.

It is said that a fiction can never be denied so as to defeat the end for which it was invented, but for every other purpose it may be contradicted. What that means I do not exactly know. That is what the learned judges that have delved in this branch of the law have said. I have an inkling of what it means, but I have no definite knowledge of what it means when applied to this branch of the law. For some purposes the law says that property is in the place of the owner's domicile when it is not actually there,, and for some purposes this fiction is utterly disregarded.

7 Wall. 150
147 U.S. 476

In the 7th of Wall a gentleman residing in N.Y. was indebted in a large sum of money to a citizen of N.Y. He had some personal property actually situated in Ill. He gave a chattel mortgage upon that property to a New York creditor.

Subsequently another New York creditor went to Chicago and levied an attachment upon that property. There was a controversy touching the priority of title as between a man who levied an attachment and the man who had taken the mortgage upon this property. This attachment was levied before the mortgage was recorded or possession taken under it. Under the laws of Ill. such a recording and delivery was essential to the validity of the mortgage. So that according to the law of the place where this property was actually situate the mortgage was illegal. According to the law of the place where this property was in accordance with the legal fiction the mortgage was good. The question was how far will the Supreme Court indulge in the fiction that this property whose actual situs was in Chicago was for the determination of that controversy in the State of New York. The Supreme Court held that the property was subject to the law of the place where it actually was and that the legal fiction which might otherwise be indulged in could not stand against the law of the place where the property was at the instance of a creditor who had levied his attachment in accordance with the law of the place where the property actually was.

You would say that this ended the common law fiction. It received a very severe blow, but the common law is a pretty tough proposition and does not die so easily.

In

147 U.S. supra, Lester was a citizen of Utah and owned personal property in Idaho. He was indebted to a number of persons none of whom resided in Idaho. He became bankrupt and made an assignment with preferences that was valid in Utah, but invalid according to the laws of Idaho where this property actually was. Some creditor also levied upon this property and the controversy here arose between the assignee under the assignment and the attaching creditor. The Supreme Court said that inasmuch as Lester was a resident of Utah it was competent for him to transfer the property in Idaho in accordance with the laws of Utah and the assignee took precedence over the attaching creditor.

At first blush these two cases would seem to be utterly irreconcilable. But the Supreme Court made a distinction in the two cases. In the former cases the creditors were domiciled in N.Y., whereas in the latter case there were no creditors in Idaho. And it was held that inasmuch as Lester was domiciled in Utah, the property was situate in Utah; that this statute was not applicable to creditors outside of Idaho.

Putting the two cases together we may deduce the principle that in contemplation of law, a chattel is situate at the place of the owner's domicile, unless the recognition of the fiction violates some principle of local law of which a creditor domiciled in that jurisdiction desires to avail himself.

If there had been a creditor in Idaho, his attachment could have taken precedence over the assignee.

I think that you have in these two cases, if you read them carefully, all you need to know upon the subject.

Thus far we have treated the subject as if all property was tangible. But a vast amount of the property in this country and age is not held in that way. Property may be a chose in action. If I, domiciled in Detroit, owe you, domiciled in Ann Arbor $1000, where is the situs of that $1000? Where is the situs of that debt? There may be some excuse for indulging in a fiction here. It would be a matter of convenience for the law to say this thing which has no actual situs shall be situate here. The fiction that the debt is located at the domicile of the creditor has led to endless confusion. I know of know branch of the law where there is so much conflict of authority and confusion of thought. The authorities are wholly irreconciliable, and I think it is due largely to the fact that the courts have not stopped to analize the things they were considering.

I reside in Michigan and buy a bond of a N.Y. corporation. That bond is payable in New York and the interest is payable there. The debtor who has the money in his pocket to pay the debt is outside of the jurisdiction and his obligation consequently is outside the jurisdiction. The tax collector comes around and says Mr. Kirchner I want $20 on that bond. I say to him I have no $1000 in Detroit. He says you have this bond for $1000. But I say it ispayable in New York, and you cannot tax it. The statute comes in and says that that kind of thing is taxable. Whenever such a controversy has arisen in which i became necessary to locate the debt for that purpose they have located it right here. That is indulging in a fiction too.

Jan. 9th,

L E C T U R E XXV.

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Here is a coal corporation in the state of Penn. I own a share of stock in that corporation. You all know that in contemplation of law that that corporation is domiciled in the state of Pa. It cannot go outside of the state of Pa. The very share of stock that I own is taxed in Pa, and the tax is taken out of my dividens. But the Legislature of the State of Michigan has said that that property is here. It indulges in a little legislative fiction. The Supreme Court of Mich. has decided that for purpose of taxation that that property is here, whereas for the purpose of levying upon it it is in the State of Pa.

Suppose I die and my estate is administered here. Although that stock is in Pa. the Probate Court of Mich. will administer that stock and say that it is here when we all know it is not. So that you see that the situs of a chose in action while it can have no actual situs and whatever situs it may have must be constructive, differs according to the point of view. If we want to make taxes upon it the court says it is here, if we want to levy upon it the court says it is not here but there.

I trust that I have made this confusion plain.

Coming back to the question 'where is the debt.' Some years ago there lived in this city a very learned gentleman, by the name of Dr. Waples. He wrote a book upon this question. It was entitled 'Debtor and Creditor and Situs of Debt'. He told me that he was going to write a book upon this subject and clear the whole matter up. One morning he met me and said"I have unravvelled this thing. The right to recover the thing is with the creditor and the duty to pay it is with the debtor .' He wrote a book of 264 pages in which he made it so clear that any man though he be a fool he might not err. That dinstinction which he made, and which arouses your risibilities, had never been observed or recognized by the courts. The obligation to pay is with the debtor here and the right to recover is with the creditor. What is the importance of this? It is as practical a question and as important a question as any that I know of in the law. It arises nearly every day. It has come up before the Supreme Court of the U.S. a score of times. It comes up in this way: Here is a man who works for a railroad company. He lives in Detroit. He works for the Lake Shore & Mich. S. R.R., an Ohio corporation. The Lake Shore is garnisheed for the wages of his employee. The corporation says we are an Ohio corporation; we do not owe this man anything in the state of Michigan. His wages are payable in Ohio. Or for example,

here is a man who resides in N.Y. He owes a man in Mich. Smith of N.Y. owes me and you owe Mr. Smith. I begin garnishment proceedings against you forwhat you owe Smith. If the obligation to pay rests with you then that obligation is within the jurisdiction of the state of Michigan and I can attach it by garnishment proceedings.

The Supreme Court of the U.S. recently decided that I could. The Harvard Review says that the supreme Court of the U.S. is wrong about it.

This is the question and it is a question upon which the court have disagreed ever since I knew anything about the practice of the law and they are still at it. The thing that seems to trouble them is the inability to give a satisfactory answer to the question where is the debt. As a general rule the legal situs is at the creditor's domicile. The rule, however, is subject to exceptions. The extent and limitations of the rule have never been clearly defined and the cases are not in harmony.

78 Ala. 524
57 Vermont 622

The question of the situs of a debt, especially with reference to garnishment are in hopeless conflict. But I take it that the case of

174 U.S. 710

has practically settled the question, not because a decision of the Supreme Court of the U.S. affecting a question of common law is binding upon all the courts, but because in virtue of the Constitutional provision and the act of Congress in conformity therewith has provided that full faith and credit shall be given to the acts and judicial proceedings of the several states. What the Supreme Court of the U.S. says upon a question is binding for the reason that if a state court disregards what the Supreme Court has said its judgment may be reversed by the Supreme Court of the U.S. I said to Dean Hutchins the other day that this decision rightly understood made utterly useless the forty pages of manuscript that I had prepared upon the subject. This was a very little case, involving very little money. This case was begun in the Justice Court in Kansas. The action was brought by one Stearn against the Chicago & Rock Island R.R. to recover a balance claimed to be due him for wages during his last three months of employment and the amount claimed was $140. And having begun his suit in the Justice Court, of course he recovered a judgment for $140. It is a might poor justice that cannot render a judgment for the plaintiff. This defendant had a line of road that ran through the state s of Kansas and Iowa. It was therefore a resident both of Kansas ans Iowa. Stearns was indebted to somebody in Iowa and this Iowa creditor sued Stearns in Iowa without getting service upon him and garnisheed the road in Iowa. Judgment having been rendered against the road in Kansas, the road appealed from the judgment of the justice court to the District Court and when the case was called for trial in the District Court the road moved for a continuance upon the

ground that it had been garnisheed in Iowa and that the principal suit to which the garnishee proceedings were collateral had been appealed and the defendant railroad company was unable to say whether it was bound as garnishee of the defendant Stearns in Iowa who was the principal plaintiff in the suit pending in Kansas. Stearns was the plaintiff in Kansas and the defendant in the suit in Iowa, and in Iowa the principal defendant in the Kansas suit had been garnisheed for this very debt. When the Kansas case came up on appeal the defendant said this case ought not be tried because we are garnisheed in Iowa and that suit is pending on appeal and until that appeal is disposed of it will be impossible to tell whether or not we, the company, are liable as garnishee. This motion was overruled by the trial court of Kansas and Stearns recovered a judgment against the Railroad company in Kansas. To the judgment the Supreme Court of the State issued a writ of error and the question there was whether the court in Kansas was bound to take notice of the proceedings in Iowa. The Supreme Court of Kansas held that the lower court was not bound to take notice of the garnishee proceedings and thereupon a writ of error issued from the Supreme Court of the U.S. to the Supreme Court of Kansas to review this finding. Ordinarily you cannot take a case to the Supreme Court of the U.S. unless the amount of the claim is $5000 exclusive of cost and interest. But here was involved what is known to lawyers as a federal question And the federal question arose out of the Constitution of the U.S. Whenever the rights of a party depend upon the Constitution of the U.S. that party has a right to the judgment of the Supreme court of the U.S. The federal question was this: Did the Kansas Supreme Court give full credit and faith to the acts and judicial proceedings of the State of Iowa. At the bottom of that question lay the other question whether the justice in Iowa had obtained jurisdiction of the defendant and of the thing. If there was not jurisdiction in the Iowa court then there was nothing to which the Supreme Court of Kansas need give full faith and credit. If there was not jurisdiction the judgment of the Iowa court was a nullity, and the question of jurisdiction again involved the question WHERE IS THE SITUS OF THIS DEBT? It was said in this case that the money sought to be recovered is the same money that is sought to be recovered in the garnishee proceedings and under the laws of Iowa the court had jurisdiction thereof and that said money was not at the time of the suit exempt from garnishment. The defendant alleged that the amount due the plaintiff was wages due for services performed within three months prior to the commencement of the action. That he was a resident of and that his wages were exempt under the laws of Kansas and not subject to garnishment.

It was held that the obligation to pay resided with the debtor. He is supposed to have the money and that money in his hands is proceeded against and is within the jurisdiction

of the court and the garnishment proceeding is essentially a proceeding in rem. It follows from this view that the Iowa court had jurisdiction and the Kansas court did not give full faith and credit to the acts and judicial proceedings of the Iowa court.

Let me put the case in another light. Mr. Smith owes me money. Smith resides in N.Y. Mr. Jones who lives in Ann Arbor owes Smith. You will understand that he could not begin an action in personam against Smith in Michigan unless he was fortunate enough to catch Smith with the jurisdiction. I begin an action by summons against Smith in the Circuit Court here, at the same time I issue a garnishment writ against Jones here. Then I proceed in that case precisely as if I had attached personal property. If I had attached personal property the judgment would be valid so far as there was personal property within the jurisdiction to satisfy it. I garnishee Jones and he comes in and answers that he owes Smith $1000 the amount of my claim against Smith. The court awards a judgment against Jones as garnishee of Smith and Jones is directed to pay that money to me. So far we have no question of international law. By the payment of the money to me has he discharged the debt he owes to Smith? Smith could not sue him here. Smith is not in any hurry, he waits until some fine day and Jones is in New York and there sues him for his debt. Jones pleads in bar of the action the garnishment proceedings in Mich, and the payment of the money in discharge of that judgment. Smith says I know nothing about the proceedings in Michigan. I care nothing about it. I was not a party to it. The Michigan court had no jurisdiction over this matter because the debt was owing to me and that debt was located wherever I was. I was never domiciled in Michigan. Therefore Smith says the court had no jurisdiction of the party or the thing and its judgment is a nullity. The Supreme Court of the U.S. said THAT THE OBLIGATION TO PAY THE DEBT IS WITH THE DEBTOR. And it is that obligation that you seek to reach in the garnishee proceedings. And when the debtor is here the obligation is here and the obligation IS A THING SUBJECT TO THE PROCESS OF THE COURT. If it is a thing and the thing is here you have established jurisdiction of the court here. It follows from the decision of the Supreme Court of the U.S. that the Michigan Court had jurisdiction, and having jurisdiction it is the duty of the court of N.Y. to accord full faith and credit to the judgment rendered in the Michigan court in that proceeding. This is one of the things decided in the 174 U.S. supra.

Let us carry the illustration a step farther. Smith says that this money which is owing to me is exempt by the law of the state of N.Y. where this money was payable. The Supreme Court says that that does not make any difference. The exemption law does not affect the contract, it affects the remedy and the remedy is governed by the law of the place where the suit is begun. So the exemption law has nothing to do with the case.

----oOooo----- Jan. 12, 1903.

L E C T U R E XXVI.

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There are some cases that hold that the principal defendant who is not served with process and who is domiciled out of the jurisdiction is not bound by any such garnishment proceedings without he had notice.

In my opinon this case eliminates the entire discussion .

Suppose I deposit money in a bank. There is created between the depositor and the bank the relation of debtor and creditor. Nevertheless the courts have held that where the money is thus localized it is taxable here. That it is within the power of the state to pass laws to tax that property In the 49 La. Ann it was held that money deposited in a bank to pay a nonresident debtor was no taxable. I do not quite see the distinction.

Negotiable promissory notes and bonds for the payment of money stand upon a ground of their own. A note or bond is a chose in action. A bond or note is also property inherent; it is a thing in itself. The thing has a double aspect. It is a thing in possession as well as in action. If I have a bond of the Michigan Central R.R. Co. I am the owner of a chose in action in that I have a right to sue the Michigan C.R.R.Co. for the amount of the bond when the bond matures. But I am also the owner of a chose in possession in that I may transfer that bond which carries with it the obligation. A bond or promissory note is both a thing in possession and a chose in action. This is a very important distinction to be observed. This Preston bank case might have turned upon this distinction as to two of the defendants, that is that a bond is both a chose in action and a thing in possession in accordance with the occasion we have to view it.

SHIPS AT SEA stand upon a ground peculiar to themselves. Ships at sea have an entirely different standing from ships within a harbor. Ships at sea not within the territorial limits of any state are subject to the jurisdiction to which they belong, and title thereto may be transferred in accordance with its laws. A merchant ships that hails from Mass and is navigating the Atlantic or Pacific Oceans is governed by the laws of Mass. For some purposes that ship is a part of the country whose flag it flies. That is while she is abroad on the high seas. When that merchantman comes into a harbor of a foreign country she loses her extraterritoriality and becomes subject to the municipal law of the place where she happens to be. So that a vessel registered in N.Y. is deemed part of the teritory of the state of N.Y. and everybody aborad her is subject to the laws of N.Y. That vessel goes to Boston and anchors in the port of Boston. Her extraterritoriality is gone. The people abord her are subject to the laws of Mass. That is a doctrine that is much misunderstood. It is generally supposed that a vessel is part of the country from which she hails. That is not true of a private

vessel. That is only true of a public vessel,-- a man of war. A public vessel never ceases to be a part of the territory of the country to which it belongs. suppose a German merchant ship comes to N.Y. and lays in the habor off Sandy Hook. The mate kills a man on board of the vessel. Can he be prosecuted in the state of N.Y.? Certainly. The thing was done within the territorial jurisdiction of the state of N.Y. Suppose this happened on board a German Man of war. The mate kills a seaman. The vessel is in the port of N.Y. Can the mate be proceeded against in N.Y. No. Why? Because it is in accord with the fiction of international law that a public armed vessel when abroad partakes and is still a part of the territory of the country to which it belongs. so in contemplation of international law and that is part of the common law, that offense was committed in Germany and not in N.Y. That is a fiction that cannot be contradicted. when you invade a man of war you invade the territory of that country to which the vessel belongs and whose flag she flies.

What remedy has the U.S. if an outrage was commited aborard one of these ships? Suppose a citizen of the U.S. accepting the hospitality of the officers of the vessel should go on board and should get into an altercation and a German officer should kill him. Could that officer be punished by the laws of N.Y.? The only redress would be for the government to request the German government to punish this offense.

Suppose a German merchant ship lying in the habor in N.Y. should have on board a party who had committed a crime on board that vessel while lying in N.Y. and that vessel steams out of N.Y. and makes tracks for Germany. It would be competent for us, if we had the ships, to chase here and stop her and insist upon the surrender of the defendant.

This matter challenged the attention of the Supreme Court of the U.S. some years ago and the case is reported in the

16 Wall. 610

A & B were the owners of a vessel then abroad upon the Pacific Ocean. A & B failed and were declared to be insolvent by the Mass. Court. C was appointed assignee. In due time that vessel arrived in N.Y., and the moment it arrived there it was attached by a creditor of A & B. C came in and said that this vessel belonged to him because he was the assignee of A & B. Thereupon a controversy arose between C, the assignee, and the attaching creditor, touching the priority of their claims to this vessel. If this vessel at the time of the appointment of the assignee had been within the territorial limits of Mass there would have been no sort of question but that the assignee would have taken title to that property. If the vessel had been in the port of N.Y. at the time the assignment was made then it is clear that the vessel was outside of the territorial limits of Mass and the insolvency decree would have had no force and effect. But this vessel

was not within the territorial limits of any state. But being upon the high seas was a part of the territory of Mass. and therefore the insolvency decree of the insolvency Court of Mass. did operate to transfer title to that vessel. If at the time of the insolvency decree that vessel had been in N.Y. the N.Y. creditor would have taken precedence.

I have been asked if a person's interest in an insurance policy could be garnisheed. The garnishee procees in this country is based purely upon statute. These statutes have undergone very great changes. For a long time in this state an insurance policy could not be garnisheed. The language of the statute being that no sum would be the subject of garnishment the payment of which is subject to a contingency. In this state insurance may now be garnished. But if the policy contains an option that insurance Co. may rebuild it could not be garnished.

PATENT RIGHTS are rights in property that the inventor has in his invention. They are purely statutory ans differ in different jurisdictions. There was no common law patent. It has not been the policy of states to recognize such a right conferred by other states.

COPY RIGHTS stand upon a different footing. They existed at the common law. In 1710 the statute of Ann took away much of the right existing at the common law. The significance and importance of this statute is that the Congress of the United States ad copied this statute, and the judicial construction given to the old act by the Courts of England has been given to the act of Congress.

U.S. Rev. stat. 4952, Amended March 3, 1891
26 U.S. Statutes at Large, p. 1006
4 Parr. 2408
8 Peters 591

The author of any literary or dramatic work is the sole owner of the manuscript and its contents, and any copy of it, so long as he does not publish it, or part with his right to the property. His right will be protected in any common law country, irrespective of his residence and citizenship. This manuscript that I have here from which I am reading these lectures belongs to me. You can make an abridment of it, that is take down the substance of it, but you cannot make a stenographic copy of it and sell it.

4 H.L. Cas. 815
2 Biss. 208
2 Kent. Comm. 373, 3rd Ed.
9 Am. Law. Reg. 33
47 N.Y. 532

TRADEMARKS are closely allied to copy rights. They are recognized as property both by the common law and equity.

Hence a foreign manufacturer may restrain the fraudulent use of trade marks in this country. You may not copy exactly a man's trade mark, but so nearly as to deceive the public. The ssence of the infringment is the deceit of the publid. It is doubtful how far the trademark of an alien would be recognized in Continental Europe.

You will find this whole subject discussed in Kent's Comm., 13th ed. p. 373, where the cases are fully cited.

Congress by the act of July 8th, 1870 passed a law for the regulation and granting of trade marks, and that was supplemented by the act of Aug. 14th, 1876. Both acts were held unconstitutional for the reason that the Constitution does not give any right to Congress to legislate upon trade marks.

100 U.S. 82

In 1881 Congress enacted a lawproviding for the registration of trade marks. The registration of the trademark does not concern itself with the validity of the trademark. The registration is mere prima facie evidence that it is a legal trademark.

WILLS AND BY TESTAMENTS.

Disposition of property by wills:

Movables. The law of the testator's domicile at the time of his death determines his capacity to make a will, and the form and solemnities that shall attend its execution. This rule is now well established in England, although at one time it was seriously doubted.

It was upheld in this country in

1 Binney 336

Here a will of personalty was valid by the law of the testator's domicile when made. The testator changed his domicile and then died. The will was not valid by the law of the new domicile. The will was held to be invalid. It was not made in accordance with the forms and solemnities required by the law of the testator's domicile at the time of his death. Such is the American doctrine.

So held in

2 Douglas 515
1 Mason 381

But a foreign will, however, executed in accordance with the law of the testator's domicile must be probated here in order to give it effect.

There are statutes in some countries and in some states that have done away with the disastrous effect of this doctrine in regard to change of domicile, holding that if the will was legal according to the testator's domicile when made, a subsequent change of domicile will not work to avoid the will.

The rule, however, is subject to theseexceptions: (1) A will valid according to the law of the testator's domicile has no power to change the status of persons or things in a foreign jurisdiction, established by its laws.

-----oOo----- Jan. 12, 1903.

L E C T U R E XXVII.

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If I, domiciled here in Michigan, should make a will in which I provided that my slaves which I own in another jurisdiction should be liberated upon my death, and it is not the policy of the jurisdiction where those slaves are to allow a slave to be liberated or manumitted. Such a will is contrary to the public policy of the jurisdiction in which the slaves are, and when I set them free I change their status and that status is contrary to the public policy of the jurisdiction where the things are. Therefore the will will not be rendered effective.

There is a case precisely in point in the
9 Smed . & Marsh. 247

Here the testator was domiciled in Virginia. His will was executed in accordance with the laws of Va, and it directed that slaves in Miss. be emancipated and sent to Africa. It was held by the court in Miss. that such a will could not be given effect because it was contrary to the laws and public policy of the state of Miss. It is hard for us torealize at this day that there was ever a time in this country where the freedom of a human being was contrary to the laws of a state.

2 La. Ann. 377

Here the testator was domiciled in Miss. and owned slaves there. The property was left to two sons, with the provision that if either died withoutissue, his share should go to the other. One son was domiciled in La. and died without issue. The law of La. prohibited testamentary distribution and it was held that the survivor's claim could not be upheld in that state. You will observe that although it was the policy of La. to prohibit the distribution of property in La., it was not disregarded for that reason, but for the reason that it changed the status of these people.

I have already said to you that the will shall be construed according to the law of the testator's domicile at the time the will was made.

10 HL. Cases 1
1 Swa. & Tris. 118

In regard to immovables, the lex loci, the law of the place where they are actually situated, governs the capacity or incapacity of the testator, the extent of his powers to dispose of the property, the forms and solemnities to give the will effect.

It is to be interpreted according to thelaw of the place where it is made.

Justice Story, para. 479 h, gives this illustration: A will was made in England by a person domiciled there in favor

of the heirs of A, who had no children. The testator had property in England, . . Jamaica and British Guyana. If the will was construed by the English law, the father would take. Under the law of Jamaica the elder brother, and if by the law of Guyana the father, brother and sisters would take. The question was did the testator use the word 'heirs' in three different senses? It is pretty certain that he did not. Being domiciled in England he may be presumed to have used the word in the English sense.

In this connection, I want to call attention to a very recent case, which has been the subject of considerable discussion by Dicey and Sir Frederick Pollock in the English Law Review.

You will find the discussion in the July number of the English Law Quarterly, Vol. 19, page 705.

The facts in this case were briefly these. Here was a woman who we will call A who was not born in lawful wedlock. She was born in the Isle of Malta, and was at the time of her birth a British subject. Her father was a British subject and her mother was a Maltese woman. She was domiciled in Malta. This woman afterwards intermarried. A child was born. And in 1894 she died in Frieber, Baden, Germany where she was domiciled and had been domiciled for 62 years. She made a will and that will was admitted to probate. By that will she gave a number of legacies, which she undoubtedly thought disposed of all her property, but after the debts and legacies were paid there remained a residue undisposed of by this will. So as to that property the woman died intestate. The question was to whom did it belong. In Baden, Germany, personal property does not follow the domicile of the owner. But is disposed of according to the nationality of the person. Some of this property was in England. The English courts have been called upon to administer this property, the question arose as to how it should be disposed of. This property ought to be disposed of according to the law of her domicile. The domicile of adoption was undoubtedly Baden, Germany, and her domicile of origin was Malta. According to the law of Baden, Germany such property must be disposed of according to the law of her nationality. There was no law of her nationality that disposed of her property. There is no law of great Britain that disposes of such property. What did the English Court do. It did the next best thing. It said this woman is a British subject and there is no national law of England for the disposition of her property, the best thing to do is to go back to her domicile of origin and divide the property according to the law of Malta. This opinon has gathered around the court that announced it a storm of criticism that is somewhat . . . unparalleled in the history of British jurisprudence. Dicey takes up the cudgels against the court and Pollock for the court. The case is going to

the House of Lords.

All that I have to say about it is that if the law of the woman's domicile of origin is not to govern the distribution of that property, what will.

LIENS.

No man in this country is supposed to be able to sell more than he has. A man cannot sell a thing that he does not own. Notwithstanding it seems that a lien created on property in one jurisdiction may be lost by removal of that property to another jurisdiction. Exactly why that is so I have never been able to understand. If a thief breaks into my stable and steals my horse and carriage and takes them over the line into Ohio I can recover them if I can find them. But if I have a lien in the nature of a mortgage or otherwise on that property and they are removed out of the jurisdiction and some person buys them who has no knowledge of the mortgage In some way which I have never been able to understand, that lien seems to be utterly gone.

129 U.S. 355Walworth was the owner of a cotto. plantation, which he had let. By the terms of the lease he had a lien upon all the cotton that was raised. The tenant shipped this cotton to New Orleans where the consignee in good faith made advancements without knowledge of Walworth's lien. It was held that the consignee had a claim that took precedence to Walworth's lien.

8 Mich. 143

There was a chattel mortgaged duly executed in accordance with the laws of Canada, and the mortgagor was left in possession. He brought the property to Michigan where it was levied upon and sold under execution. Thereupon a controversy arose between the mortgagee and the purchaser under the execution sale. It was held that the title under the execution sale must prevail over the mortgagee's title. The court held that the property was not sufficiently described under the Canadian statute. Then the court says it is a more serious question whether the mortgage even if otherwise valid could prevail over the levy. The court ruled that inasmuch as the mortgage was not accompanied by change of possession it was void, and the statute had no extraterritorial force. The Canadian statute provided that a mortgage was void unless there was a change of possession or the mortgage was filed . The court said that this statute which provided for the filing of the mortgage has no extraterritorial force in Michigan. If you will examine this decision closely you will find that this mortgage was defeated, (1) because the property was no described in conformity with the Canadian statute; (2) that the Canadian statute had no extraterritorial force in Mich. I do not see how the latter portion of the statute lost it force in Michigan when the other part had force in Michigan.

The case came up again in the

49 Mich. 66

Here chattels in the state of Indiana were mortgaged by a resident of that state to another resident of the state and the mortgagor suffered to retain possession. The mortgage was duly recorded in accordance with the laws of Indiana. Afterwards, without the mortgagee's knowledge, the mortgagor removed the property to Michigan, and there sold the property to the defendant for $98 when the property was easily worth $300. Thereupon the mortgagee brought replevin. The court said that the question had been disposed of in the case I have called your attention to. (Montogmery v. Wright, 8 Mich 143).

The question was brought up again in the case of 84 Mich. 301.

A resident of Nebraska gave a chattel mortgage to a resident of the same state and the mortgage was recorded according to the laws of that state. The mortgagor was suffered to remain in possession of the property. He took the property to Mich. without the consent of the mortgagee and the property was here attached at the suit of the mortgagor's creditor, and upon the authority of the other two cases, it was held that the attachment must prevail over the mortgage.

I think the law is in a state of lamentable confusion upon this question. Sometime the court will take hold of this matter and do away with these cases and set the thing right. When a court reaches a conclusion that I think they should not have reached, I can generally see how the court reached it. But how they ever got there in these cases I do not understand, and I have never found any body that did. That only shows the superiority of the bench.

PROPERTY AS AFFECTED BY THE MARITAL RELATION.

In this connection you should remember that the rights recognized by the common law are different from those established by statute in common law jurisdictions. The rights affecting married women in common law courts are different from those rights in civil law jurisdictions. The rights in the several states are different from those of Continental Europe. This condition of things presents a nice question of international law. As to movables, the American, English and Continental authorities agreed that, except for purposes of succession, the law of the husband's domicile governs. That is the law of the husband's domicile at the time of the marriage. Suppose, for the purpose of illustration, that the state of S. Carolina has the old common law doctrine that the wife's choses in possession vest in the husband at the time of the marriage and that with respect to choses in action they vest in the husband so far as he reduces them to possession. Here is a young woman in Mich. who owns large amounts of property all over the U.S. A young man comes from S.C. and married her. As soon as he marries her all her property vests in him. You don't have to go to

S.C. to accomplish this result. It is accomplished eo instanti they are married in Mich.

So held in France in 1854.

The courts of common law countries hold that future acquisitions are subject to the laws of the new domicile. That is, if this girl in the state of Michigan should come into the possession of other property after her marriage that property would be subject to the law of her husband's domicile.

So held in Md., Ala., Wis., and Calif. And is a settled doctrine as announced by Justice Story in his conflictof Laws, page 187.

Suppose these people abandon their domicile in S.C. and come back to Michigan, will the woman get back herproperty? The laws of Michigan say that the property of a married woman shall remain free and independent of her husband. But because she married a man who was domiciled in S.C. that property becomes his. She then has no property upon which the laws of Michigan can operate. Property which is acquired in virtue of domicile cannot be divested by a change of domicile.

So held in
7 0 Me. 125
50 Ind. 288
52 Calif. 302

Courts have gone so far as to hold that obligations created by the married woman valid by the law of her domicile may be enforced against her property in another state.

111 Calif. 241

This is the rule unless there is something in the public policy of the state that this rule contravenes.

So held in
73 Ill 285

Also held that the rights of succession of movables as between husband and wife are controlled and governed by the law of the husband's domicile at the time of his death.

49 Calif. 18.

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Jan. 13th, 1903.

L E C T U R E XXVIII.

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R E C E I V E R S

A receiver is an officer of the court, usually a court of chancery, appointed to take charge of property in litigation. In modern times receivers have been appointed to a very great extent to take charge of the property of corporations. The object of a court in appointing a receiver is to preserve the property from destruction. Here is a large corporation that is unable to meet its obligations; its property may be utterly lost if left to the prey of its creditors. In such a case the court may take charge of the concern, through the instrumentality of a receiver, and run the business so as to preserve the property for the benefit of thecreditors. There was a time when the power of the court to appoint receivers in this way was very much criticized. But the power of the court to appoint a receiver to run and operate a railroad and take charge of corporate property and otherwise to take charge of property in litigation is not now questioned.

Here is a great line of railroad extending from Chicago to the Pacific Ocean. The line runs through a great many states. Here is a receiver appointed in Illinois by the U.S. court over this corporation. What power has that receiver in states outside of the jurisdiction that has appointed him? To obviate this difficulty the foreign courts appointed what is known as an ancillary receiver. The receiver that is appointed in the first suit is called the primary receiver. The receivership is denominated the primary receivership. In each district through which this road runs an ancillary bill is filed and in that ancillary suit upon that bill an ancillary receiver is appointed. So that the first person appointed as primary receiver is ancillary receiver in the districts through which that road runs. Then you have a receiver appointed within every jurisdiction in which that receiver seeks to exercise his authority. But it may sometimes happen that property of the corporation may exist not only outside of the jurisdiction that appointed the primary receiver, but also outside of the jurisdiction that appointed the ancillary receivers, and the amount of the property is not of sufficient consequence to justify the filing of a bill and the appointment of an ancillary receiver in that jurisdiction. Now what are the rights of the receiver over that property? As a matter of principle, it is impossible to distinguish the rights of a receiver from those of an executor or guardian or any officer appointed by executive or judicial authrotiy within the state. As a matter of principle, he has no authority outside of the territorial limitations of the jurisdiction which appointed him. But the law is not always logical. When the court recognizes that a line of reasoning has become impracticable, then the line of reasoning will stop right there and a new process be begun. So

XXVIII.

the courts have said, as a matter of comity,(they had better said, as a matter of practical necessity) we will recognize the rights of a foreign receiver to property outside of his jurisdiction.

Some courts make an exception, they say that the rights of a foreign receiver will not be recognized when they militate against the rights of home creditors.

Whatever doubts there may be as to the rights of a foreign receiver, there is no doubt that the receivership vests in him the title to the property within his jurisdiction, and if that property be personal property and is removed out of his jurisdiction, his rights in that property will not be lost. If his property is removed to another jurisdiction he may claim it there.

A receiver is an officer of the court and his possession is said to be the possession of the court. On general principles, you cannot sue a receiver without leave of the court. This a rule that has raised a great deal of objection throughout the country. Here is a railroad that has come into the hands of a receiver. The receiver runs the road in a grossly negligent manner and maims and injurs a great many people. The persons injured may not sue the receiver without leave of the court that appointed him. Of course this leave is always given. But sometimes the court that appointed the receiver may say we will not allow you to sue this receiver and have a jury, but if you have been injured you can file your bill or petition and we will determine what thereceiver should pay. The Federal judiciary is usually made up of very able men and it is usually safe to trust the matter to them, but here is a poor farmer who lives in the Northern part of Mich. who has a cow killed through the negligence of the receiver, instead of suing in his own county he has to come down to Detroit and present his petition. In such a case great hardship would result. Therefore an act of Congress was passed which permitted a receiver to be sued when appointed by the Federal court.

How about a foreign receiver? Is it necessary to get the permit of the court to sue him? Suppose a receiver is appointed by the Federal Court in the district of Ill. If you sue him without leave of the court, the utmost you have done is that you have been guilty of contempt of court. The court of Ill. cannot cite you a citizen of Mich. to appear there and answer for contempt. Therefore I think it is safe to be [illegible] done.

INTEREST

Wharton says, sect. 501, that interest in its international sense, is of three kinds:

(1) That secured by contract either directly or by implication, there being no wrong act charged.

(2) That which is assigned by way of damages for breach of contract; and is in the English practice called damages, in the French dommages-interèts.

(3) That which comes from delay in the due performance of a contract, and in the English practice is sometimes called 'moratory interest'; in the German Verzungszinsen; and in the French interets moratoires.

The cases in this country and in England hold that interest based upon contract is governed by the law of the stipulated place of performance. I am speaking of interest as contra- distinguished from damages measured by the rate of interest. The latter is governed by the forum rather than the place of contract.

1 Wash. C.C. 376
Story para. 307
6 Cranch 22

If I agree to buy $100 worth of goods in Mich. and I fail to pay for them and I am sued in the state of N.Y., I must pay the $100 plus the interest as established by the laws of the state of Michigan. If I agree to deliver the goods and do not deliver them, and I am sued in the state of N.Y. the rate of damages is not the rate of interest in Michigan, but the measure of damages is the rate of interest as established by the laws of N.Y. The damages that are recovered are gauged by the law of the place where the action is pending.

It is important to distinguish between interest as such and damages which are measured by the rate of interest.

The currency in which payment shall be made is that of the place where the money called for is payable.

Justice Story says: If the action is brought in another country, the judgment must be for an amount sufficient to enable the plaintiff to purchase the amount of currency agreed upon at the place of performance. When a currency at the place of performance or payment has depreciated between the time of contract and the time when payment is claimed, then, viewing the matter according to the principals of international law, the plaintiff, if the question arises before a foreign court, is entitled to recover that which would give him an equivalent in currency to that which which he would have been entitled to had no such depreciation taken place. Sec. 517.

You are probably aware that after three efforts to settle the question the Supreme Court of the U.S. in the 118 U.S. finally decided that it was competent for Congress to make the notes and promises of the U.S. legal tender for the payment of debts. What has happened may happen again. We may have another war; there may be another issue of grenn backs and these greenbacks may depreciate. There was a time in the history of the U.S. during the civil war when gold stood at a premium of 2.84. It took 2.84 worth of green backs to buy one gold dollar, or $1 in gold was worth $2.84 cents in greenbacks because green backs were legal tender and the standard of value.

A case came up in Michigan. A man borrowed money in hard money times. He gave a mortgage as security. He was able to pay off that mortgage in the depreciated currency of the government.

Another case arose in the 13th Mich. Here a mortgage provided in terms for the payment of the amount of money in gold. And it was held that inasmuch as greenbacks were legal tender, the mortgagor was not obliged to pay in gold. That decision has since been overruled. The Supreme Court of the U.S. held that a person may contract to pay in gold.

It must have become apparent to you by this time that the term 'Private International' is very misleading. I prefer very much the name given by Sir Robert Fillamore, -'The Law of Comity.' For each country determines for itself to what extent it will recognize and enforce rights which arose in a foreign jurisdiction. Take the subject of divorce. We are just as civilized as the English people; they have one law and we have another. It is a violation of language to say here is an international law effecting private rights. All we can say is that every civilized state recognizes in a measure rights which have accrued in foreign jurisdictions, but reserved to themselves the right to repudiate such rights as it pleases, and the principle which underlies the recognition of those rights is very well denominated by the word comity. We are a very great commercial country, so is England, Germany and France. One would think as a matter of paramount necessity that the law pertaining to contract--what law governs the valid-

ity of a contract, what law governs its execution, what law its discharge--should be well settled between these countries. But it is not. We have not even settled the question in America. One state holds one way and one another. The Supreme Court of the U.S. has held all around the question. If a contract is made here to be performed in N.Y., I cannot say what law determines its validity,-whether it is the law of Michigan or the law of N.Y.-- such is the confusion of the cases.

Now what is a contract. I will not give Blackstone definition, a promise upon a sufficient consideration to do or not to do a certain thing. There are a great many thing founded upon a sufficient consideration that the law will not enforce. I lease you a store building and you pay $500 in advance for the rent. But it happens that building is to be used for an illegal or immoral purpose. What becomes of the contract? There is no contract in the law. There is a promise but the law refuses to lend its sanction to that promise. I say to you, the next time I come to Ann Arbor I will give a book to each one of you. Can you enforce the promise? Of course you cannot enforce it. The courts say there is no consideration for that. The law says that there must be consideration. In order to make a contract there must be a promise for a promise, and there must be a sanction by the law to those promises. So that the sanction of the law is just as essential to the contract

as the promises. Mill in his system of Logic starts the query: If a man chops at a tree and keeps on chopping until the tree falls, which has more to do with the falling of the tree, the chopping of the man or the force of gravity: Suppose I make another promise: I say if you will come to my office in Detroit, I will give you each a book. And you come to Detroit, and I refuse to deliver the books. The courts say in that case you have a right of action. Why? Because I induceed you to come to Detroit by my promises when otherwise you would not have come. There is consideration for the contract. In this case which is the most important, the promise or the law that sanctions it. I think they are about even. One without the other is useless. I have made a contract here, and is to be performed in N.Y., and such a contract is not valid in N.Y. Is that contract binding? Or put the case in another light. Suppose the contract is not valid in Mich. but it is in N.Y. where it is to be performed. I begin an action on that contract in N.Y., and the reasoning of some of the courts is that the law of N.Y. where the contract is to be performed must govern. What do you think of that. Whatever you and I have done on that contract was done here and the law of Michigan declines to sanction that thing as a binding obligation in the state of Michigan. So that the thing when done and where done would have no legal sanction. Therefore one would suppose as a matter of reasoning that there is no legal contract. So are the Mass. decisions, but there are a great many decisions to the contrary.

You will remember that the legal character of an act, contractual or otherwise, depends upon the law of the place where the act is done. If it is not, it is either dependent upon no law at all, or it is dependent upon the law of a jurisdiction outside of which the act was done, or in other words you give a law extraterritorial force, which is against principle. Therefore it would seem obvious that the legal effect of a contractual act must be dependent upon the law of the place where the actis done. But the courts do not all say so. The Supreme Court of Mass. holds to this rule. But the Supreme Court of the U.S. says otherwise. The Supreme Court of the U.S. says that the contract is determined by the law of the place where the contract is made, but that the contract is really made at the place where it is stipulated to be performed.

10 H.L., Vol. 10 page 174
Justice Marshal, Elements of Juris.
Hollins Juris. page 12
125 Mass. 374
103 Mass. 323
3 Moore, Privy. Council, New S. 191

----oOo---- Jan. 15, 1903.

L E C T U R E XXIX.

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Let us look at what the Supreme Court of the U.S. has done. The earliest case, not in point of time, but the earliest case to which I want to call your attention is the

6 Peters 635

That was an action upon a bond, signed, sealed and delivered in Md. It was given to release an attachment levy in the state of La., and it was conditioned for the payment of whatever judgment might be recovered in the attachment suit in La. The supreme Court of the U.S., in an action by the surety for contribution, that the court would regard this contract, signed, sealed and delivered in Md., as having been in fact made in La, for the reason that judgment in the attachment suit would be rendered in La, and the money under the bond paid there. .

7 Peters 435

That was an action upon a joint and several bond conditioned for the proper performance by the principal of the of the office of Naval Agent of New Orleans. This bond was signed, sealed and delivered in La., and by the laws of La. each surety is liable only for his portion of the sum due on the bond. The common law doctrine is that each surety is liable for the whole. If one of the sureties pays the whole he has a right of contribution against the other sureties. In an action upon the bond one surety was sought to be made liable for the whole. The defendant said this contract was made in La. and the Law of La. says I am liable only for my portion. The Supreme Court of the U.S. said not so, the contract was made with the government, and in contemplation of law, where the principal powers of that contract were exercised, to-wit, in the District of Columbia, was the place whose laws governed that contract.

I am of the opinon that these cases did not involve the validity of these contracts. The involved the extent of the obligations arising under the contracts. But I called your attention to them for the reason that the U.S. Supreme Court planted its decisions upon the ground that the contracts, were in contemplation of law, made where it was to be performed, not where it was in fact made.

But a Mass case

[illegible] 24

was a case that involved the validity of the contract rather than the extent of the contract.

That also was an action upon an indemnity bond. It was executed in N.Y. and was not valid there for the reason that it lacked adequacy of consideration. By its terms it was conditioned to be performed in La. And by the law of La a consideration for this kind of a contract was wholly unnecessary.

The question was not to the extent of the liability, but the question was, was this a valid obligation or was it not. The law of N.Y. where this contract was in fact made did not sanction that engage, and declared that the undertaking of the parties imposed upon them no legal obligation whatever. The Supreme Court of the U.S. held that it was a binding contract because it was to be performed in La. and the law of La sanctioned it. The court said that every personal contract is governed by the law of the place in view of which it was made because the consent of the parties has made that law a part of the contract. It is therefore to be presumed, in the absence of any express declaration to the contrary, that the parties had in contemplation a law according to which that contract would be upheld rather than one by which it would be defeated.

146 U.S. 117

That was an action on a verbal agreement to accept a draft in Missouri. This agreement to accept the draft was made in Marshal, Mo., and the draft was payable in Chicago, Ill. An action was brought upon this verbal agreement to accept. It was objected that the verbal agreement was not binding by the laws of Mo. where the agreement to accept was made. The court overruled the objection. The court said the agreement to accept and pay was to be entirely performed in Ill, which was the place of residence of the defendant.

Cases arise where the contract is in fact made in one state, while the subject matter is in another.

12 Mich. 63
33 Mich. 469
36 Mich. 153

The next case

91 U.S. 406

illustrates the difficulty of determining where a contract is made. A Chicago firm sold pork to a St. Louis firm, with the understanding that they were to draw a draft upon the St. Louis firm for the price. They did so. This draft was payable in Mo. The vendors of this pork took this draft to the bank and wanted a cash credit for it. The bank refused to receive it as a cash credit, but they were willing to receive it for collection. A representative of the St. Louis house, who happened to be in Chicago, went to the bank and stated that the draft had been drawn for the purchase price of pork sold to them, and also stated that the draft would be paid. Thereupon the Bank credited the draft as a cash item. The draft was forwarded to St. Louis and payment refused. Thereupon the Chicago firm failed. Immediately after the Chicago bank brought an action against the St. Louis firm, first, upon an agreement to accept the draft, and second upon an acceptance. It was contended that inasmuch as this draft was drawn on a St. Louis firm and payable there, that the acceptance of the draft was made according to the tenor of the draft and it operated as an agreement to pay the amount of the draft in St. Louis, Mo., the place of performance, and according to the law of Mo. where this money was to be paid a verbal acceptance was not binding. Therefore this verbal acceptance made

in Chicago was of no validity. That would seem to be pretty good logic from the standpoint of the Supreme Court of the U.S. How do you suppose the Supreme Court answered that? They said that the agreement to accept was performed in Chicago because it was made there and an agreement to accept operates as an acceptance therefore it was performed in Chicago, and being performed in Chicago its validity was to be determined by the law of Illinois, and by the laws of Ill. a parol agreement to accept is valid.

What was the promise this man made? To pay the draft where? In Mo., was it not. According to my limited reasoning powers, it seems to me his agreement to perform was made right there in Chicago. His agreement was to accept. Having made the agreement to accept, that agreement must be enforced. And where was that to be performed? In Mo. If the law of the place where the contract is made, rather than the law of stipulated performance determines its validity, this decision is all right. But if the law is otherwise,--the law of the place of performance determines its validity--I do not see how they ever reached this conclusion. But there it is, and it is a leading case.

An action was brought against a steam ship company for loss of goods. The steam ship company had agreed to carry these goods from New York to Liverpool, freight in terms payable in Liverpool. The goods were lost off the British coast. If this case was determined according to the English law there was no liability. If the case was determined according to the American law there was a liability. It was contended that this contract was to be performed in Liverpool, Eng., and the freight was to be paid there, and therefore the English law would furnish the law of this contract. That seems pretty clear doen't it? What was the place of performance of that contract. The supreme Court of the U.S. said that it was not a contract to be performed in England. And why did they say that? Why, they said, that contract was to be performed all the way from the port of N.Y. across the ocean to England; that the performance of that contract began when the steamboat company received the goods and was being performed all the way across the ocean and was completed when they reached Liverpool. And therefore this contract having been made in N.Y. and in part performed in N.Y. was a N.Y. contract and the liability of the parties were to be determined by the law of N.Y.. What do you think of that? I would not have had the gaul to have made that defense. I think I would have been ashamed to make that defense, but it was held to be a good defense, and it only goes to show how ignorant I am. But the U.S. court stands alone in that doctrine.

The case came up again in the
74 N.Y. 120

That was a suit in a N.Y. court for loss and injury to baggage. The baggage was shipped from Philadelphia. It was shipped through part of the states of Pa., N.J. and N.Y. Nevertheless the court held that it was a contract by its terms to be per-

formed in N.Y. The court said: 'The place of final performance of the contract being in N.Y., although the transportation was mostly through other states no reason exists why a failure to deliver the baggage should not controlled by the laws which prevail at the place of delivery. It is said that the contract is entire and indivisible, and we are referred to some cases outside of this state, which it is claimed sustain the doctrine that the locaility where the contract was made in cases of this character must control. None of the cases cited are entirely similar to the one at bar and do not involve the precise question now considered. But even were it otherwise, they are not, I think, controlling, as no reason exists why a contract to deliver baggage should not be governed by the laws of the place where the baggage is to be delivered.

It seems to me that the Supreme Court of Mass. has taken the philosophical and reasoning view of the matter. It is argued that the law of the place where the act is done determines its legal quality. Therefore when what is done does not create a contract, it can have no validity in another jurisdiction, although it is to be performed there and the parties contract with reference to its being so performed. If this were carried to its logical conclusion, the law of the place where the contract is entered into should also cover its interpretation. I want you to examine this question, and see for yourself what ought to be the law. I think the weight of authority as to the number of cases is against the Mass. doctrine.

3 Moore Priv. Coun. N.S. 290
Holland Juris. Chap. 12, p. 181
Markey Elements of Law, sec. 241

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Jan. 16, 1904.

L E C T U R E XXX.

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There is one case in the U.S. Supreme Court which I intended to call your attention to Friday, but I misplaced my papers. It is the case of

140 US. 326. In this connection I wish you would read

3 Comstock 366,

and compare the two cases. I will give you the first. The Equitable Association, a N.Y. corporation, issued a policy of insurance in the state of N.Y., and this policy provided that its premiums should be paid in N.Y., and the loss, if any should be payable in N.Y. This company received its application for insurance in the state of Mo. . so far as the making of the contract was concerned it was delivered in Mo. and the premium was in fact paid in Mo. There was a default in the payment of premiums and there was a lapse of the policy according to the laws of N.Y. where this contract was to be performed. There was a statute of Mo. which provided that two premiums had been paid there would be no lapse of policy. An action was brought in the Circuit Court of the U.S. in Mo. upon the policy. There is no sort of doubt but that in the state of N.Y. where this contract was by its terms to be performed that this policy had lapsed, and there was no right of recovery. It has always occurred to me that the right of recovery might have been based upon this statute in Mo. for the reason that when the Insurance Co. came to the state of Mo. to do business and solicit policies there they by implication consented to be bound by the laws of the state of Mo. However, the U.S. court did not rest its decision upon that ground. They held that the N.Y. law had no application to the contract because the contract never became a completed contract until the delivery of the policy and the payment of the premiums in Mo., and that therefore the contract was subject to the Mo. statute, notwithstanding the fact that the contract was by its terms payable in N.Y. and not in Mo.

Possibility it may be within your capacity of analogy and criticism to reconcile this utterance of the learned bench with the other utterances that I have called your attention to. The distinction between this case and the others is that this case is an insurance case, and courts have always been very liberal in construing contracts of insurance in favored of the insured and very strict as against the insurer.

The case of

2 Wood 244

is a very interesting case. There was a contract made in N.Y., which provided for the performance of various things to be performed in different states; that is, it was a contract for the construction of a railroad through several states. It was a contract, not to be performed in one place, but several places.

A portion of this work was to be done in N.Y., but most of it was to be done in the southern states. A bill was filed to rescind this contract on the ground of non-performance. The question arose what place furnished the law for the interpretation of this contract. As Dicey puts it, 'what was the law of this contract.'

Justice Bradley says that the case must be governed by its own circumstances. The building of the railroad in La. was an important consideration for the contract, but not sufficient to control the entire contract, which was governed by the law of N.Y., as the place where the contract was made, and in part performed.

That is not consistent with what the court said in the previous case.

125 Mass.

says that a "contract valid where made is valid every where, but it is not enforcible every where." This language is liable to be misunderstood.

This case is somewhat modified by the case of

163 Mass. 326

This leads me again to say that there does not seem to be in this country any broad system of private international law, but that the enforcement of rights which have accrued in foreign jurisdictions are matters in each instance of local policy of the forum. According to the Mass. doctrine a contract may be valid, but the policy of the state forbids them having anything to do with the matter.

96 Mich. 243

That was a case that came up from Ann Arbor. It was an action upon a promissory note, dated on Monday, but in fact made on Sunday, and payable in Ohio. The plaintiff, the maker of this note, instead of waiting for an opportunity to begin his action in Ohio, brought his action in Michigan. Inasmuch as this note had been in fact made on Sunday, it was void here. But inasmuch as it was payable in Ohio, Judge Kinney delivering the opinon of the court, held that although the contract was made in Michigan, inasmuch as it was payable in Ohio, in contemplation of law it was made there and the plaintiff could recover. The case came up before the Supreme Court of Michigan. They did not question the rule that the validity of a contract must be determined by the place where it was to be performed. The Supreme Court of the state seemed to take that as granted. But they held that the plaintiff could not recover on that note in this state. It may be so that the validity of this note any where else is to be determined by the law of the place where it is payable, but this note is void by the law of Michigan where it is sought to be enforced, and we cannot allow parties to avoid our laws by making a contract here payable some where else.

Our Supreme Court said, it is an elementary principle, that one who has directly participated in a violation of law cannot be permitted to avail himself in courts of justice of any rights founded upon or growing out of the illegal act.

According to some of the courts, the question of the domicile of the parties has something to do with the case.

46 Miss. 618
112 N.C. 59
76 Fed. Rep. 582

In that case the federal court of the U.S. maintained an action upon a contract by repudiating part of it. It enforced so much as it liked and dismissed the rest.

This was an action for damages on a part cargo. There was a bill of lading defining the duties and rights of the parties. This bill of lading stipulated that the ship should not be liable for damages caused by stowage or negligenc; and that the English law should govern the interpretation of the contract. Damage was done to the cargo by reason of defective stowage and negligence. Action was brought in the Supreme Court of the U. S. Remember that all the rights and obligations of the parties were determined by the contract, and the defendant said that the terms of the contract specially exempted him from liability. This contract was valid according to the English law. Our court enforced the part of the contract by which the part agreed to ship, and repudiated that part which exempted the shipper from liability.

68 Fed. Rep. 230-1
15 C.C. App. 262

The Statute of Frauds presents some questions of difficulty in cases of this kind. You all know that there two sections of the statute of Frauds which are of great importance. The first provides that no action shall be brought upon certain contracts therein mentioned, unless, unless it be in writing signed by the parties to be charged thereby or his agent thereunto lawfully authorized. The 17th section is that certain contracts therein mention shall not be held to be good unless in writing, signed by the parties to be charged therewith, etc. A casual reading of the two sections would seem that they mean they same thing. The courts do not regard those two sections as meaning the same thing. They make the distinction that a contract falling within one provision of the statute will be enforced and falling within the other will not be enforced. They say that when the statute provides that no contract shall be held to be good unless it is in writing, that that provision goes to the evidence of the contract. A contract falling within the 17th section of the Statute of Frauds is not good in Mich., but it may be good in a jurisdiction where there is non statute of Frauds, because the writing is only evidence of the contract and not the contract itself. Whereas if the contract falls within the 4th

section of the Statute of Frauds, which provides that no action shall be brought, that is an inhibition upon the jurisdiction of the court to entertain a suit founded upon such contract.

The leading case upon this subject is

Leroux v. Brown, 12 Common Bench

BILLS AND PROMISSORY NOTES and endorsements thereon seem to stand upon a ground of their own. I want to call your attention to two cases in this connection, one an American case, one an English case, which at first blush seem to lead to rather startling results.

12 Wend. 439

Bigelow's Leading Cases 79

That was an action against a payee of a bill of exchange, who endorsed it to the plaintiff. The bill was drawn at the French island of Martinique on parties in Bodeaux, France and payable in N.Y.

Although this bill was drawn out of the jurisdiction of the U.S., it was endorsed to the plaintiff a citizen of N.Y. This bill was duly presented for acceptance and acceptance was refused. It was held that the law of N.Y. where the endorsement was made determined what steps should be taken to charge the endorser. This bill was presented in Bordeaux, France. It had upon it the signature of the drawer and the signature of the endorser, and when it was thus presented it was dishonored. In order to hold the parties it was necessary to present the bill for protest, and the protest involved the giving of certain notice to the parties concerned. Inasmuch as it was dishonored in Bordeaux it was protested before a French Notary in accordance with the laws of France which he thought was the law of that contract. But this defendant, who was the endorser upon that paper said no. If the endorsement is a good contract, every endorser thereon makes a new bill. That when he made that contract in N.Y., the conditions of his liability were determined by the laws of N.Y. And the conditions of that liability were that he should have notice of the dishonor according to the laws of N.Y. He did not receive this notice. The notice as required by the laws of France was not such notice as is required by the laws of N.Y. Therefore he was not liable upon the bill. The court thereupon held that every endorsement was a new contract, and hence should be governed by the law of the place where it was made, and not by the place where the bill is payable.

Notice of dishonor must be given according to the law of the place where the contract was entered into, that is where the endorsement of the bill was made.

This doctrine has been severely criticized by all text writers.

Daniel Negotiable Instr. Sec. 901

Kent. Comm. Vol. 2, p. 459

L E C T U R E XXIX.

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Let us look at what the Supreme Court of the U.S. has done. The earliest case, not in point of time, but the earliest case to which I want to call your attention is the

6 Peters 635

That was an action upon a bond, signed, sealed and delivered in Md. It was given to release an attachment levy in the state of La., and it was conditioned for the payment of whatever judgment might be recovered in the attachment suit in La. The Supreme Court of the U.S., in an action by the surety for contribution, that the court would regard this contract, signed, sealed and delivered in Md., as having been in fact made in La, for the reason that judgment in the attachment suit would be rendered in La, and the money under the bond paid there.

7 Peters 435

That was an action upon a joint and several bond conditioned for the proper performance by the principal of the of the office of Naval Agent of New Orleans. This bond was signed, sealed and delivered in La., and by the laws of La. each surety is liable only for his portion of the sum due on the bond. The common law doctrine is that each surety is liable for the whole. If one of the sureties pays the whole he has a right of contribution against the other sureties. In an action upon the bond one surety was sought to be made liable for the whole. The defendant said this contract was made in La. and the Law of La. says I am liable only for my portion. The Supreme Court of the U.S. said not so, the contract was made with the government, and in contemplation of law, where the principal powers of that contract were exercised, to-wit, in the District of Columbia, was the place whose laws governed that contract.

I am of the opinon that these cases did not involve the validity of these contracts. The involved the extent of the obligations arising under the contracts. But I called your attention to them for the reason that the U.S. Supreme Court planted its decisions upon the ground that the contracts, were in contemplation of law, made where it was to be performed, not where it was in fact made.

But a Mass case

[illegible] 124

was a case that involved the validity of the contract rather than the extent of the contract.

That also was an action upon an indemnity bond. It was executed in N.Y. and was not valid there for the reason that it lacked adequacy of consideration. By its terms it was conditioned to be performed in La. And by the law of La a consideration for this kind of a contract was wholly unnecessary.

The question was not to the extent of the liability, but the question was, was this a valid obligation or was it not. The law of N.Y. where this contract was in fact made did not sanction that engage, and declared that the undertaking of the parties imposed upon them no legal obligation whatever. The Supreme Court of the U.S. held that it was a binding contract because it was to be performed in La. and the law of La sanctioned it. The court said that every personal contract is governed by the law of the place in view of which it was made because the consent of the parties has made that law a part of the contract. It is therefore to be presumed, in the absence of any express declaration to the contrary, that the parties had in contemplation a law according to which that contract would be upheld rather than one by which it would be defeated.

146 U.S. 117

That was an action on a verbal agreement to accept a draft in Missouri. This agreement to accept the draft was made in Marshal, Mo., and the draft was payable in Chicago, Ill. An action was brought upon this verbal agreement to accept. It was objected that the verbal agreement was not binding by the laws of Mo. where the agreement to accept was made. The court overruled the objection. The court said the agreement to accept and pay was to be entirely performed in Ill, which was the place of residence of the defendant.

Cases arise where the contract is in fact made in one state, while the subject matter is in another.

12 Mich. 63
33 Mich. 459
36 Mich. 153

The next case

91 U.S. 406

illustrates the difficulty of determining where a contract is made. A Chicago firm sold pork to a St. Louis firm, with the understanding that they were to draw a draft upon the St. Louis firm for the price. They did so. This draft was payable in Mo. The vendors of this pork took this draft to the bank and wanted a cash credit for it. The bank refused to receive it as a cash credit, but they were willing to receive it for collection. A representative of the St. Louis house, who happened to be in Chicago, went to the bank and stated that the draft had been drawn for the purchase price of pork sold to them, and also stated that the draft would be paid. Thereupon the Bank credited the draft as a cash item. The draft was forwarded to St. Louis and payment refused. Thereupon the Chicago firm failed. Immediately after the Chicago bank brought an action against the St. Louis firm, first, upon an agreement to accept the draft, and second upon an acceptance. It was contended that inasmuch as this draft was drawn on a St. Louis firm and payable there, that the acceptance of the draft was made according to the tenor of the draft and it operated as an agreement to pay the amount of the draft in St. Louis, Mo., the place of performance, and according to the law of Mo. where this money was to be paid a verbal acceptance was not binding. Therefore this verbal acceptance made

in Chicago was of no validity. That would seem to be pretty good logic from the standpoint of the Supreme Court of the U.S. How do you suppose the Supreme Court answered that? They said that the agreement to accept was performed in Chicago because it was made there and an agreement to accept operates as an acceptance therefore it was performed in Chicago, and being performed in Chicago its validity was to be determined by the law of Illinois, and by the laws of Ill. a parol agreement to accept is valid.

What was the promise this man made? To pay the draft where? In Mo., was it not. According to my limited reasoning powers, it seems to me his agreement to perform was made right there in Chicago. His agreement was to accept. Having made the agreement to accept, that agreement must be enforced. And where was that to be performed? In Mo. If the law of the place where the contract is made, rather than the law of stipulated performance determines its validity, this decision is all right. But if the law is otherwise,--the law of the place of performance determines its validity--I do not see how they ever reached this conclusion. But there it is, and it is a leading case.

An action was brought against a steam ship company for loss of goods. The steam ship company had agreed to carry these goods from New York to Liverpool, freight in terms payable in Liverpool. The goods were lost off the British coast. If this case was determined according to the English law there was no liability. If the case was determined according to the American law there was a liability. It was contended that this contract was to be performed in Liverpool, Eng., and the freight was to be paid there, and therefore the English law would furnish the law of this contract. That seems pretty clear doen't it? What was the place of performance of that contract. The supreme Court of the U.S. said that it was not a contract to be performed in England. And why did they say that? Why, they said, that contract was to be performed all the way from the port of N.Y. across the ocean to England; that the performance of that contract began when the steamboat company received the goods and was being performed all the way across the ocean and was completed when they reached Liverpool. And therefore this contract having been made in N.Y. and in part performed in N.Y. was a N.Y. contract and the liability of the parties were to be determined by the law of N.Y.. What do you think of that? I would not have had the gaul to have made that defense. I think I would have been ashamed to make that defense, but it was held to be a good defense, and it only goes to show how ignorant I am. But the U.S. court stands alone in that doctrine.

The case came up again in the
74 N.Y. 120

That was a suit in a N.Y. court for loss and injury to baggage. The baggage was shipped from Philadelphia. It was shipped through part of the states of Pa., N.J. and N.Y. Nevertheless the court held that it was a contract by its terms to be per-

formed in N.Y. The court said: 'The place of final performance of the contract being in N.Y., although the transportation was mostly through other states no reason exists why a failure to deliver the baggage should not controlled by the laws which prevail at the place of delivery. It is said that the contract is entire and indivisible, and we are referred to some cases outside of this state, which it is claimed sustain the doctrine that the locaility where the contract was made in cases of this character must control. None of the cases cited are entirely similar to the one at bar and do not involve the precise question now considered. But even were it otherwise, they are not, I think, controlling, as no reason exists why a contract to deliver baggage should not be governed by the laws of the place where the baggage is to be delivered.

It seems to me that the Supreme Court of Mass. has taken the philosophical and reasoning view of the matter. It is argued that the law of the place where the act is done determines its legal quality. Therefore when what is done does not create a contract, it can have no validity in another jurisdiction, although it is to be performed there and the parties contract with reference to its being so performed. If this were carried to its logical conclusion, the law of the place where the contract is entered into should also cover its interpretation. I want you to examine this question, and see for yourself what ought to be the law. I think the weight of authority as to the number of cases is against the Mass. doctrine.

3 Moore Priv. Coun. N.S. 290
Holland Juris. Chap. 12, p. 181
Markey Elements of Law, sec. 241

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Jan. 16, 1904.

LECTURE XXXII.

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BANKRUPTCY PROCEEDINGS.

You should always distinguish between bankruptcy and insolvency proceedings. A bankruptcy proceeding is one which discharges a debtor from the payment of his debt; an insolvency proceeding is one that discharges him from imprisonment for debt. We have in this state no such thing as imprisonment for debt simply, but when an obligation has been incurred independent of contract and execution against the property of the debtor has been returned unsatisfied it is competent in this state to issue a capias ad satisfaciendum against the body of the debtor. He can only be discharged from imprisonment by giving a bond for the payment of the debt or making an assignment under the state insolvency laws.

All our bankruptcy laws rest upon the power given in the Constitution to Congress to establish a uniform system of bankruptcy laws throughout the U.S. Without this provision Congress would have no power to pass any bankruptcy laws because there is a provision in the U.S. Constitution which inhibits the passage of any law impairing the obligation of a contract.

How far is a discharge in bankruptcy a discharge of the indebtedness? Suppose I owe a debt to a citizen of Great Britain who is not domiciled hre. Is my debt to him released by my discharge in bankruptcy? That depends entirely upon where the debt was payable. If it was payable here he would have no right of action against me and I would be discharged of the debt. If it was payable there I would not be so discharged. There does not seem to be any conflict of authority upon that question.

It was said by the Supreme Court of the U.S. in an early case that the bankruptcy laws of a foreign country was not capable of operating as a legal transfer of property in the U.S..

5 Cranch 289

It does not appear whether this property was real, personal or both.

Suppose a foreign creditor comes to a court here and proves his claim and submits himself to the jurisdiction, then the debt owing to him is discharged if there be a discharge in bankruptcy.

COURTS.

It is important to bear in mind that all persons within the territorial jurisdiction of a country are subject to the process of the courts there established, whether temporarily or permanently there. Ambassadors

and others who carry extraterritoriality of their own country are exempt from this rule. The ambassadors from Great Britain, Germany, France and Russia cannot be sued in the U.S. They are not subject to the process of our courts.

Therefore it follows from the general rule that the defendant cannot plead his alienage or any privilege attaching to him by the law of his domicile or otherwise in bar of the court's jurisdiction.

It seems, however, that this rule or principle , so firmly rooted in common law countries is not every where recognized.

Suits affecting immovables must be brought in the country of their situs. It is not competent for a court in Michigan to litigate the title of a piece of property in the state of N.Y., or conversely. But indirectly the court may act upon that property provided the person who has the disposition of that property be within the jurisdiction of the court. For instance, I have a land contract with a citizen of N.Y. He agrees to convey to me a house and lot on 5th Avenue in the city of N.Y. I cannot take any proceedings in Michigan to affect the title to that property, but if that person comes here and submits himself to the jurisdiction of that court, I may compel him by a bill for specific performance to carry out that contract. I may compel him to execute a conveyance of the house of lot in N.Y. city. That is indirectly accomplishing what could not be directly accomplished. You can see that the conveyance of the property is a personal act and if he is within the jurisdiction he is subject to the process of the court. The court is incompetent to act in rem with respect to that property, but it is competent to act in personam upon the owner of that property by compeling him to execute a conveyance.

There are countries where legislation has been enacted in which it is sought to acquire a jurisdiction over persons without the jurisdiction.

The Common Law Procedurre Act of England, of 1852, provides for service outside of England in actions upon contracts made in England. It is needless to say, that while service under this act may be the basis of a judgment in England it has no international validity. But you will observe that a party may always voluntarily appear. I may bring a suit against a person outside of the jurisdiction. If I do not obtain service of process within the jurisdiction, my suit goes for nothing; but if he appears and submits himself to the jurisdiction of the court he waives the objection of want of jurisdiction.

In civil law countries a person may be prosecuted and convicted whether he be present in court ornot.

That principle is repugnant to the common law. No person in a common law country can be tried and convicted either criminal or civilly when he is not there to be tried.

An alien enemy, you understand, may not sue unless he is under a safe conduct, under special protection of the government, or unless he is permitted to reside here after hostilities

have been commenced. After the cessation of hostilities the right of action revives.

A foreign sovereign may sue. The Emperor of Germany may sue here both in his private and political capacity. He may sue here as Wilhelm Hohenzollern, or William II by the Grace of God, etc. But he may not come here and enforce any political rights for the sovereignty of the U.S. covers the whole field, and the courts do not sit to enforce purely political rights.

I am not in a position to give you a definition of a political right as contradistinguished from a legal right. These distinctions are very largely historical and the basis of the distinction is historical. We get most of our theory of law from England. In England the sovereign of the state was in theory the fountain of hornor, the fountain of justice, in fact he was the whole thing. There was no division of the powers of government between the legislature, executive and judiciary. The legislature was a branch of him.

The dividing line between a judicial and a political question is extremely shadowy.

7 How. 1.

Mr. Martin Luther was a citizen of Mass. and he brought an action quare clausum fregit against the defendant a citizen of R.I. for breaking and entering his house. You are all aware that at one time there was a rebellion in R.I. and there was set up in that state in place of the old government, The Dorr Government. The people had become disatisfied with their constitution. So the people got together and called a convention and framed another constitution. The Dorr government was established and Martin Luther was an adherent of the Dorr government. Mr. Luther made it very uncomfortable for the other government, and the defendant in this case was an officer of the other government, and he justified what he did because he said he did it by warrant of law. If the Dorr government was the legal government, then what the defendant did was not justified by law; on the other hand if the Dorr Government was not the de jure government of R.I. , then the defendant was justified in what he did. The question came up was it the lawful government. Mr Daniel Webster contended that it was competent to tey that question in a court of law. He wanted to show that the vast majority of citizens of R.I. had voted for the Dorr government and that the government was the government of the vast majority. That was a question, so far as Martin Luther was concerned, which affected his private rights, but the question which determined whether he was acting within his private rights was a political one, that is was the Dorr Government the lawful government. In determining this question the Supreme Court of the U.S. said that the President

of the U.S. inherent in him by the Constitution of the U.S., had recognized the other government, and that was a political judgment touching the political status which was binding upon the court. And Martin Luther failed to recover in that action. The court held in substance that a state "may use its military power to put down an armed insurrection too strong to be controlled by the civil authority;" and if the legislature of R.I. thought the peril so great as to require the use of its military forces and the declaration of martial law, there was no ground on which this court could question its authority; and as Borden acted under military orders of the charter government, which had been recognized by the political power of the country, and was upheld by the state judiciary, he was justified in breaking into and entering Luther's house.

What if there had been no recognition of this government by the political power of the country, what would have been the decision of the court? I think it would have been the same. I think the court would have said we have no power to determine a political question. Therefore we cannot adjudicate upon the private rights of Martin Luther that are founded upon this political question.

There seems to be an opinon among the people of this country that everything is a judicial question. There are a great many question with which the courts have no power to deal whatever.

Here the governor of the state was authorized to determine when certain work was done, and to issue a certificate upon which the persons doing the work would be entitled to certain land. The governor refused to sign the certificate because in his opinon the work had not been satisfactorily performed. The court said that the issue in that matter involved the discretionary power of the state and was not a judicial question.

38 Mich.
143 U.S. 342

Not many years ago this question arose in connection with the controversy between Great Britain and the U.S. with respect to the Alaskan boundary and the right to seal fisheries; the extent of the jurisdiction of Great Britain and the U.S. over certain waters in the Behring Sea. These matters were the subject of diplomatic negotiations. About sixteen years ago British statemen thought they saw a chance whereby they could get the Supreme Court of the U.S. to committ itself upon this question. They employed Joseph Choate to argue this case before the Supreme Court. In that case a schooner had been seized on the high seas under a libel filed in the district court of the U.S. for the District of Alaska. Great Britain contended that the seizure took place in British waters and the court had no jurisdiction over the vessel. Here was a chance to get the Supreme Court to pass upon that question.

The Supreme Court of the U.S. said "While we place our

decision upon other grounds, we might rest it upon the grounds that the question of territorial jurisdiction could not be determined by it, inasmuch as the question was then pending between the U.S. and a foreign power and was subject to diplomatic negotiations between the powers. But we need not go further in this discussion---this is a political question." This question of territorial jurisdiction is a political question and not a judicial one.

THE FORM OF PROCESS is always determined by the law of the place where it is issued. For instance whether a scroll will serve the purpose of a seal is determined by the law of the forum. Whether you shall begin your action by summons, petition complaint, etc. is a question that will be determined by the law of the forum.

What is and what is not evidence is determined by the law of the forum. But it is not always easy to determine what is evidence of a thing as contradistinguished from the thing itself. The rule is simple, but the application of it is difficult.

Parish records, parochial registers of death and marriage are determined by the law of the forum

The seal of the state, and whether its officers are entitled to sue will be noticed judicially by the Court. The seal of a foreign sovereignty will be recognized prima facie bona fide. Rules of evidence, relevancy, competency are determined by the law of the forum.

--------oOo--------

Jan. 20th, 1904.

L E C T U R E XXXIII.

-------oOo-------

F O R E I G N L A W.

Foreign law is considered as a matter of fact. A foreign law may be written or it may be unwritten, and when you have proved the text of the law there remains still the construction to be put upon it. I do not see how you can separate the text from its meaning because its meaning is its whole significance. But still text writers and jurists have sought to make the distinction. Here is a jury trial and the question is what is the foreign law upon a certain subject. In the event of conflicting evidence by the experts upon the subject it is a matter of grave import to let the question go to a jury. In this country the right of trial by jury has been insisted upon to a greater extent than in other countries. The Chief Justice of Ontario said to me discussing a certain important question, 'we do not turn a jury loose on a thing like that." The grave responsibility of this has impressed itself upon jurists and they have sought to limit this rule which makes a question of foreign law a question of fact for the jury. In the first place in the absence of any evidence to the contrary it must be assumed that the law of a foreign country is like our own law, providing of course that the law in this country upon the subject is not a statute, but is the unwritten law. Exactly why that distinction should be made, I am not quite clear. The statute law is even more certain than the unwritten law, but the unwritten law is just as much a part of the body of our law as the written law. In the former case the courts indulge in this presumption, in the latter they do not. I think the distinction may rest upon the ground that the unwritten law is made up of general principles and it is more likely that these general principles would obtain in a foreign country than a statute which has been adopted to meet some particular exigency.

It is also said that we will take judicial notice of the law merchant.

Ordinarily it is said that the foreign law is proven just like any other fact, but is is an exceptional fact. Two lawyers may differ as to what the law is in a given case and so you see this fact is a matter of opinon. Upon this subject how a foreign law should be proven all sorts of opions have been given, but I think the trend of the cases is that you may prove the law of a foreign country by reading in evidence the law reports of that country, you may prove it by a person learned in the law. Formerly it was assumed that a person was learned in the law only when he had been admitted to the bar. In a recent case

77 Pa. St. 507

the court refused to recognize that distinction. They said a man was competent to give evidence touching a matter of foreign law if he showed that he had studied the subject and was familiar with it and thought himself competent to pass upon the question.

The Mass. courts have held that it is competent to prove a foreign law to read the reports of that country in evidence.

99 Mass. 253
12 Grey 248
124 Mass. 85

There are statutes in some states that allow that to be done.

It was at one time held that a foreign statute could only be proven by an exemplified copy of the rolls certified under the great seal.

It has been held by our supreme court that a Canadian Statute may be proven by a person who will swear that the printed books containing the statute are received and recognised in Canadian courts as evidence of the statute. Having proved that, they may be read in evidence.

So held in the case of

68 N.W. Rep. 246

Also so held in

9 R.I. 446

That also seems to be the doctrine laid down in the

Eng. & Am. Ency. of Law, vol. 23, p. 294

where the cases are fully cited.

Story Conflict of Laws sect. 638

in the

48 N.H. 179

it was held that a question what is a foreign law was a question for the court.

In the

123 Mass. 26

the court held that while the text of the law was for the jury its interpretation and meaning was for the court. That may be good sense, but I cannot see it that way. Here is a statute of France, whether it is a copy of the text is for the jury, what is the legal effect of that statute in France this court says is for the court. What does the Mass. Judge know about the interpreation of a French statute.

Sometimes it becomes necessary to take testimony of witnesses abroad. And that ordinarily is a very simple matter. You issue a commission and a commissioner is appointed in the other jurisdiction to take the testimony of the witnesses there. He takes the testimony provided the witnesses are willing to appear before him. Suppose they are not willing? Then he has no power to issue process for their appearance, unless there is a statute in the state in which the testimony is to be taken that authorizes him to issue process. Ordinarily a commission issues and their is no practical difficulty. But In Continental Europe, England and America you can issue Letters

rogatory which empowers a person to take the testimony and to summon the witnesses and issue process for their appearance.

The competency of the witnesses and the competency and relevancy of their testimony will be determined, not by the law of the place where their testimony is taken, but by the law of the place where the case is tried and where the testimony is adduced, that is, by the forum where the letters rogatory issued.

The obligation of parties to produce letters and papers is determined by the law of the court that conducts the examination. But the force and value and effect of producing them is determined by the law of the place where the letters are issued.

Whether an assignee may sue in his own name is determined by the law of the forum, but whether the assignment is valid or not is determined by the law of the place where the assignment is made.

STATUTE OF LIMITATIONS.

I suppose you are familiar with the rule that the Statute of Limitations does not extinguish the debt, but simply affects the remedy. The language of the statute is that no action shall be brought unless the same be prosecuted within a certain time after the right of action has accrued.

Suppose the Statute of Limitations is six years in Michigan and seven years in N.Y. The debt may be barred by the statute of Michigan, but I may still recover upon it in N.Y.

You must distinguish between a Statute of Limitations and a statute that extinguishes the debt, for instance, like the bankruptcy statute. If the statute says that after the lapse of six years it shall be conclusively presumed that the debt is paid, that would be a different proposition. If the statute discharges the obligation it is discharged everywhere provided it has jurisdiction of the parties.

Courts have not been satisfied with this general principle, and have set about and imposed all sorts of limitations and exceptions upon the rule. The first exception is that when the right of action is grounded on a statute pure and simple and the statute that gives that right of action also prescribes a limit of time within which that action may be prosecuted, that then that limitation does not AFFECT THE REMEDY, BUT THE RIGHT.

119 U.S. 199
120 U.S. 756

The courts have gone a step farther and said that when a statute gives a right of action and a special statute of limitations is passed which limits the right of action with respect to that particular cause of action, then that statute of limitations affects the right and may be pleaded any where.

So you see that the court are gradually getting away from the rule.

36 Mo.
97 Fed. Rep. 635
48 L.R.A. 625

It is also held that an action based upon an act of Congress may be barred by the statute of limitations in a state.

76 Fed. Rep. 892
not 155 U.S. 610

It is competent for a party to prosecute several suits for the same cause of action in the same jurisdiction. The pendency of one suit may be pleaded in bar of the other.

But suppose I have one suit in Michigan and another in England, and another in N.Y. all for the same cause of action, can one suit be pleaded in abatement in bar of the other? It seems not. Exactly why that is so, I do not know. The courts simply say that the pendency of a suit in a foreign jurisdiction may not be pleaded in abatement.

There is only one exception to this rule, and that is where the suit was begun by a writ of attachment.

Although this is one country, the pendency of a suit in a sister state may not be pleaded in abatement of a suit begun for the same cause of action in another state.

This ends what I have to say on the subject of Private International Law.

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Jan. 20th, 1903

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